DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-1183
Vide 12-1182
Title: American Lung Association, et al., Petitioners
v.
EME Homer City Generation, L.P., et al.
Docketed: March 29, 2013
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (11-1302, et al.)
Decision Date: August 21, 2012
Rehearing Denied: January 24, 2013
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 29 2013	Petition for a writ of certiorari filed. (Response due April 29, 2013)
Apr 10 2013	Order extending time to file response to petition to and including May 29, 2013, for all respondents.
Apr 18 2013	Brief of Respondent States and Cities in support filed. VIDED.
Apr 18 2013	Brief of respondents Calpine Corporation,and Exelon Corporation in support filed. VIDED.
May 29 2013	Brief of respondents Luminant Generation Company LLC, et al. in opposition filed. VIDED.
May 29 2013	Brief of State and Local respondents in opposition filed. VIDED.
Jun 4 2013	DISTRIBUTED for Conference of June 20, 2013.
Jun 6 2013	Reply of petitioner American Lung Association, et al. filed. (Distributed)
Jun 24 2013	Petition GRANTED limited to the questions presented by the petition in No. 12-1182. The petition for a writ of certiorari in No. 12-1182 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Jul 16 2013	Order extending time to file the joint appendix and petitioner's brief on the merits to and including September 4, 2013.
Jul 16 2013	Order extending time to file respondent's brief on the merits to and including October 31, 2013.
Aug 21 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for petitioners American Lung Association, et al. VIDED.
Aug 30 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Industry and Labor Respondents . VIDED

Aug 30 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the State and Local Respondents (Texas, et al.) . VIDED
Aug 30 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents Calpine Corporation and Exelon Corporation. VIDED
Sep 4 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the Federal Petitioners. VIDED
Sep 4 2013	Joint appendix filed. (Statement of costs filed.) VIDED.
Sep 4 2013	Brief of petitioner in No. 12-1182, Environmental Protection Agency, et al., filed. VIDED.
Sep 4 2013	Motion of the federal parties to deem the Court of Appeals Joint Appendix to be Volumes 2 thru 8 of the Supreme Court Joint Appendix filed by respondent Environmental Protection Agency, et al. VIDED.
Sep 4 2013	Brief of Respondent States and Cities in support of petitioners filed. VIDED.
Sep 4 2013	Brief of respondents Calpine Corporation and Exelon Corporation filed. VIDED.
Sep 4 2013	Brief of petitioners American Lung Association, et al. filed.
Sep 10 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the State and City Respondents (New York, et al.). VIDED
Sep 10 2013	Brief amici curiae of Law Professors on Issue Exhaustion filed. VIDED. (Distributed)
Sep 10 2013	Brief amicus curiae of American Thoracic Society filed. VIDED.
Sep 11 2013	Brief amici curiae of Atmospheric Scientists and Air Quality Modeling Experts filed. VIDED.
Sep 11 2013	Brief amicus curiae of APA Watch in support of neither party filed. VIDED.
Sep 11 2013	Brief amicus curiae of Institute for Policy Integrity at New York University School of Law filed. VIDED.
Sep 11 2013	Brief amicus curiae of Constitutional Accountability Center filed. VIDED.
Sep 11 2013	Brief amici curiae of Benjamin F. Hobbs, et al. filed. VIDED.
Sep 17 2013	SET FOR ARGUMENT ON Tuesday December 10, 2013.
Sep 17 2013	CIRCULATED
Sep 30 2013	Records received from USCA for the DC Circuit electronically filed.
Oct 7 2013	Motion to deem the Court of Appeals Joint Appendix to be Volumes 2 thru 8 of the Supreme court Joint Appendix GRANTED. Justice Alito took no part in the consideration or decision of this motion.
Oct 31 2013	Brief of respondents Utility Air Regulatory Group, et al. filed. VIDED. (Distributed)
Oct 31 2013	Brief of respondents State and Local respondents filed. VIDED. (Distributed)
Oct 31 2013	Brief of respondents Luminant Generation Company LLC, et al. filed. VIDED. (Distributed)
Nov 4 2013	Motion for divided argument filed by respondents. VIDED.
Nov 7 2013	Brief amicus curiae of Chamber of Commerce of the United States of America filed. VIDED. (Distributed)
Nov 7 2013	Brief amici curiae of West Virginia and 8 Other States filed. VIDED. (Distributed)

Nov 26 2013	Motion for divided argument filed by respondents GRANTED. Justice Alito took no part in the consideration or decision of this motion.
Dec 2 2013	Reply of respondents Environmental Protection Agency, et al. filed. VIDED. (Distributed)
Dec 3 2013	Reply of petitioners American Lung Association, et al. filed. (Distributed)
Dec 3 2013	Reply of respondents Calpine Corporation and Exelon Corporation in support of petitioners filed. VIDED. (Distributed)
Dec 3 2013	Reply of Respondent States and Cities in support of petitioners filed. VIDED. (Distributed)
Dec 10 2013	Argued. For petitioners: Malcolm L. Stewart, Deputy Solicitor General, Department of Justice, Washington, D. C. For State and Local respondents: Jonathan F. Mitchell, Solicitor General, Austin, Tex. For Industry and Labor respondents: Peter Keisler, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 12-

12 1183

IN THE
Supreme Court of the United States

MAR 29 2013
OFFICE OF THE CLERK

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Clean Air Act's "Good Neighbor" provision requires that state implementation plans contain "adequate" provisions prohibiting emissions that will "contribute significantly" to another state's nonattainment of health-based air quality standards. 42 U.S.C. 7410(a)(2)(D)(i). A divided D.C. Circuit panel invalidated, as contrary to statute, a major EPA regulation, the Transport Rule, that gives effect to the provision and requires 27 states to reduce emissions that contribute to downwind states' inability to attain or maintain air quality standards. The questions presented are:

(1) Whether the statutory challenges to EPA's methodology for defining upwind states' "significant contributions" were properly before the court, given the failure of anyone to raise these objections at all, let alone with the requisite "reasonable specificity," "during the period for public comment," 42 U.S.C. 7607(d)(7)(B);

(2) Whether the court's imposition of its own detailed methodology for implementing the Good Neighbor provision violated foundational principles governing judicial review of administrative decision-making;

(3) Whether an upwind state that is polluting a downwind state is free of any obligations under the Good Neighbor provision unless and until EPA has quantified the upwind state's contribution to downwind states' air pollution problems.

PARTIES TO THE PROCEEDING

The following were parties in the proceedings in the United States Court of Appeals for the District of Columbia Circuit:

American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club, petitioners in this Court, were intervenors in support of the United States Environmental Protection Agency.

The United States Environmental Protection Agency ("EPA"), respondent in the D.C. Circuit, has filed a separate petition in this Court. The other named respondent in the court of appeals was EPA Administrator Lisa Perez Jackson. As of February 15, 2013, Ms. Jackson no longer holds that office. Robert Perciasepe is the Acting Administrator.

Additional respondent-intervenors below in support of the United States Environmental Protection Agency, who are nominal respondents on review, are Calpine Corporation; City of Bridgeport, Connecticut; City of Chicago; City of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); City of Philadelphia; Commonwealth of Massachusetts; District of Columbia; Exelon Corporation; Mayor and City Council of Baltimore; Public Service Enterprise Group, Inc.; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395);

State of North Carolina; State of Rhode Island; and State of Vermont.

Petitioners below, who are respondents in this Court, were AEP Texas North Company; Alabama Power Company; American Coal Company; American Energy Corporation; Appalachian Power Company; ARRIPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light & Power; Columbus Southern Power Company; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP; Entergy Corporation; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Company; Gulf Power Company; Indiana Michigan Power Company; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Company; Kenamerican Resources, Inc.; Kentucky Power Company; Lafayette Utilities System; Louisiana Chemical Association; Louisiana Department of Environmental Quality; Louisiana Public Service Commission; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors; Mississippi Power

Company; Mississippi Public Service Commission; Municipal Electric Authority of Georgia; Murray Energy Corporation; National Rural Electric Cooperative Association; Northern States Power Company (a Minnesota Corporation); Oak Grove Management Company LLC; Ohio Power Company; Ohio Valley Coal Company; Ohio American Energy Inc.; Peabody Energy Inc.; Public Service Commission of Oklahoma; Public Utility Commission of Texas; Railroad Commission of Texas; Sandow Power Company; South Mississippi Electric Power Association; Southern Company Service, Inc.; Southern Power Company; Southwestern Electric Power Company; Southwestern Public Service Company; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of Virginia; State of Wisconsin; Sunbury Generation LP; Sunflower Electric Power Corp.; Texas Commission on Environmental Quality; Texas General Land Office; Utility Air Regulatory Group; United Mine Workers of America; Utah America Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Case Metals Association; Wisconsin Electric Power Company; Wisconsin Paper Council, Inc.; Wisconsin Manufacturers and Commerce; and Wisconsin Public Service Corp.

Intervenors in support of petitioners below, who are respondents or nominal respondents on review, were City of New York (D.C. Cir. Nos. 11-1388 & 11-

1395 only); San Miguel Electric Cooperative, and State of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only).

RULE 29.6 DISCLOSURE STATEMENT

Petitioners American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club have no parent companies. Nor have any of them issued publicly held stock.

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OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7. The opinion may be found in the Appendix to the Environmental Protection Agency's petition for certiorari (hereinafter "App.") at 1a-116a.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. That court denied petitions for rehearing en banc on January 24, 2013.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Section 110(a)(2)(D) of the Clean Air Act requires that each state implementation plan contain "adequate provisions":

> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will –
>
> > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .

42 U.S.C. 7410(a)(2)(D).

Section 110(c) of the Act provides that:

> (1) The [EPA] Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
> (A) finds that a State has failed to make a required submission . . . or
> (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

Id. 7410(c)(1).

Challenges to EPA actions under the Clean Air Act "shall be filed sixty days from the date notice of such action . . . appears in the Federal Register." *Id.* 7607(b)(1). "Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." *Id.* 7607(d)(7)(B).

EPA's Cross State Air Pollution Rule, 76 Fed. Reg. 48208 (Aug. 8, 2011) ("Transport Rule"), is reprinted at App. B to EPA's petition for certiorari.

INTRODUCTION

Air quality in large areas of the nation is impaired by air pollution that crosses state lines and causes thousands of premature deaths and illnesses each year. Interstate pollution raises difficult and complex problems of measurement and equitable standard-setting; it is well-suited to legislative judgment and administrative expertise. Section 110(a)(2)(D)(i)(I) of the Act – known as the "Good Neighbor" provision – requires that state implementation plans contain adequate provisions to

prohibit emissions activity within their borders that will "contribute significantly" to any other state's nonattainment of air quality standards. 42 U.S.C. 7410(a)(2)(D)(i)(I).

In this case, a divided D.C. Circuit panel struck down EPA's Transport Rule, a major regulation designed to bring long-delayed relief to millions of Americans whose health is at risk because they live in downwind states unable to attain or maintain air quality standards because of pollution from upwind states. The Rule was designed to conform to a decision by a different panel of the same court that had declared unlawful a predecessor interstate air pollution rule in large part because it did not deliver downwind states sufficiently timely or certain relief.

The court of appeals' decision is riddled with error. The majority overran express statutory limits on its review authority. Despite the Act's rigorous exhaustion requirement, the panel ruled on issues that the challengers had plainly failed to raise during the public comment period. The panel also allowed collateral attacks on past agency actions long after expiration of the statute's jurisdictional time period for review. The court imposed a series of rigid strictures upon EPA's authority to give effect to the Good Neighbor provision that are not found in the statutory text and that vastly complicate its implementation. The court disregarded EPA's own explanation for the technical judgments and complex policy choices it made in crafting the Rule. And the court created an entirely new limitation, not found in the statutory text or prior administrative practice, that the Good Neighbor provision imposes no obligations on upwind states unless and until EPA

issues regulations quantifying the upwind states' contribution and abatement obligations.

The harmful effects of these erroneous rulings are far-reaching. Downwind states need the protection the Rule afforded in order to meet their own statutory obligations and to protect the health and welfare of their citizens. The decision will complicate the crafting of a workable rule that can deliver the protection downwind states were promised decades ago when the Good Neighbor provision was enacted and amended.

This Court's review is warranted.

STATEMENT OF THE CASE

A. Statutory Background

In the Clean Air Act amendments of 1970, Congress adopted a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act requires the EPA to establish science-based national ambient air quality standards for certain pollutants to protect public health and the environment. *See* 42 U.S.C. 7408, 7409. States then have a responsibility to adopt state implementation plans ("SIPs") adequate to maintain air quality standards in "attainment" areas and to bring "nonattainment" areas into compliance with those standards. *Id.* 7410(a); see *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). If a state does not timely adopt an adequate state plan, EPA must adopt a federal implementation plan for the state to address

the deficiencies. *Id.* 7410(c)(1). Specific temporal deadlines for nonattainment areas to meet air quality standards vary, and standards must in addition be achieved as "expeditiously as practicable." See, *e.g.*, *id.* 7502(a)(2)(A), 7511(a)(1), 7513(c).

The Clean Air Act establishes a comprehensive judicial review scheme that entrusts the D.C. Circuit with exclusive review of rulemakings of national significance. 42 U.S.C. 7607(b)(1). The Act affords parties broad rights of participation, and requires EPA to respond to "each of the significant comments, criticisms and new data submitted . . . during the comment period." *Id.* 7607(d)(6)(B). The Act also imposes limits on the judicial review process, including that review must be sought within 60 days of EPA's action, *id.* 7607(b)(1), and that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review," *id.* 7607(d)(7)(B). See also *id.* 7607(e) ("Nothing in this chapter shall be construed to authorize judicial review . . . except as provided in this section.").

B. Interstate Air Pollution and the Act's "Good Neighbor" Provision

Decades before Congress enacted the Clean Air Act, this Court recognized interstate pollution to be a distinct problem and area of special federal responsibility. In a series of decisions, this Court determined that a state could obtain judicial relief from out-of-state pollution on the principle that:

> When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining quasi-sovereign interests; and the alternative to force is a suit in this court.

Georgia v. Tennessee Copper Co., 206 U.S. 230, 236 (1907); see also *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Missouri v. Illinois*, 200 U.S. 496, 519 (1906). In issuing Georgia's requested injunction, the Court explained that it was "a fair and reasonable demand on the part of a sovereign that the air over its territory should not be polluted on a great scale" by pollution from beyond its borders. *Id.* at 238.

Interstate pollution remains a serious problem to this day. For many areas with difficulties attaining or maintaining the health-based air quality standards, pollution from upwind states accounts for more than three-quarters of local air pollution concentrations.[1]

State-by-state implementation of national ambient air quality standards does not by itself deal effectively with interstate air pollution because each state lacks the ability to regulate "persons beyond its control." *Tennessee Copper*, 206 U.S. at 238. The 1970 Act attempted to address interstate transport by requiring states to include transport-related "intergovernmental cooperation" provisions in their

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[1] See, *e.g.*, Air Quality Modeling Final Rule Technical Support Document, App. F (June 2011), *available at* http://www.epa.gov/airtransport/CSAPR/techinfo.html.

implementation plans. See Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1681 (1970); see also *Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973). In 1977, Congress amended the interstate transport provision by requiring states to prohibit emissions from "any stationary source within the State . . . which will . . . prevent attainment or maintenance by any other state." Pub. L. No. 95-95, §108(a)(1), 91 Stat. 685, 693 (1977). Determining that "additional efforts must be made" to address the "transport problem," see S. Rep. No. 101-228, at 48-49 (1989), Congress again amended the Act in 1990 to include the current Good Neighbor provision, which requires that implementation plans:

> (D) contain adequate provisions –
>
> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will –
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .

42 U.S.C. 7410(a)(2)(D).

C. The D.C. Circuit's Prior Transport Decisions

In the first major EPA rulemaking under the Good Neighbor provision, the 1998 NO_x SIP Call, EPA determined that the "major reason" that some states failed to timely demonstrate attainment with the

national ozone standard was that states were not able to address pollution transported from upwind areas. 63 Fed. Reg. 57356, 57361 (Oct. 27, 1998). That rule required 22 states and the District of Columbia to address their interstate contributions to downwind states' ozone pollution by reducing their emissions of nitrogen oxides ("NO_x," an ozone precursor). *Id.* at 57358. For purposes of setting upwind states' NO_x emissions "budgets," EPA determined upwind states' "significant contributions" to downwind nonattainment based on "both air quality factors relating to amounts of upwind emissions and their ambient impact downwind, as well as cost factors relating to the costs of the upwind emissions reductions." *Id.* at 57376. EPA established a model emissions credit trading program as a flexible and cost-effective mechanism for states to meet their emissions budgets. *Id.* at 57359.

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the D.C. Circuit upheld the NO_x SIP Call in relevant respects. The court upheld EPA's use of "a very low threshold of contribution" to determine which upwind states contributed to downwind nonattainment. *Id.* at 675. Noting the "ambiguity" of the statute's "significant" contribution formulation, *id.* at 678, the court also upheld EPA's decision to base states' NO_x emissions budgets primarily on the amount of emissions that could be controlled in a "highly cost-effective" manner (*i.e.*, by application of controls costing less than $2,000 per ton of NO_x reductions). See *id.* at 675-79; see also *id.* at 679 (upholding EPA's "decision to draw the

'significant contribution' line on a basis of cost differentials").

In 2005, EPA promulgated the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25162 (May 12, 2005), a rule that built upon the NO_x SIP Call and addressed, in addition to ozone, the contribution of upwind states' pollution to downwind states' unhealthful concentrations of fine particulate matter ($PM_{2.5}$). CAIR required reductions in upwind states' emissions of the pollutants – NO_x and sulfur dioxide ("SO_2") – that are precursors to fine particle concentrations downwind. CAIR required 28 eastern states and the District of Columbia to revise their implementation plans to reduce NO_x and SO_2 emissions.

The D.C. Circuit remanded CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), *reh'g granted in part*, 550 F.3d 1176 (D.C. Cir. 2008), largely because it determined that CAIR gave North Carolina insufficient protection from upwind pollution. The court did not disturb *Michigan's* acceptance of EPA's use of cost-effectiveness analysis to help determine each state's "significant contribution" to downwind nonattainment. See *id.* at 917. The court also concluded that EPA need not determine each state's individualized air quality impact on downwind states "relative to other upwind states." *Id.* at 908. The court found, however, that EPA had failed to explain how CAIR's formulation of emissions budgets based on allowance allocations from a different emissions trading program served the objectives of the Good Neighbor provision. See *id.* at 917-18. Furthermore, the court concluded that, due to features including CAIR's unconstrained

emissions trading system, the rule did not assure downwind states their congressionally prescribed protection. *Id.* The court also held that EPA had "ignored its statutory mandate" to harmonize CAIR with downwind states' statutory compliance deadlines. *Id.* at 908-12.

The court left CAIR in place as an interim measure, but required EPA to expeditiously remedy the "fundamental flaws" the court had identified. 550 F.3d at 1178.

D. EPA's Post-*North Carolina* Disapproval Actions

After the *North Carolina* decision, EPA took steps to ensure timely protection for downwind states. Section 110(a)(1) of the Act requires states to submit implementation plans (which must include adequate Good Neighbor measures) to EPA within three years after promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a)(1), 7410(a)(2)(D). For the 1997 ozone and 2006 $PM_{2.5}$ air quality standards covered by the Transport Rule, adequate state plans were due in 2000 and 2009, respectively. See 76 Fed. Reg. at 48219. In 2010 and 2011, EPA found that many states had failed to submit state plans with adequate Good Neighbor measures, and determined, in other instances, that submitted state plan provisions on transport were inadequate. *E.g.*, 75 Fed. Reg. 32673 (June 9, 2010) (finding with respect to the 2006 $PM_{2.5}$ standard for 23 states, D.C., and certain territories); 76 Fed. Reg. at 48219 (summarizing these actions). EPA explained that "[t]his finding creates a 2-year deadline for the promulgation of a [federal implementation plan] by EPA for a

particular state or territory, unless that state or territory submits a SIP to satisfy these section 110(a)(2)(D)(i)(I) requirements, and EPA approves such submission prior to that deadline." 75 Fed. Reg. at 32674.

E. The Transport Rule

EPA promulgated the regulation at issue in direct response to *North Carolina*. 76 Fed. Reg. at 48211. The Transport Rule identified 27 states whose emissions of NO_x and SO_2 significantly affected the ability of downwind states to attain or maintain compliance with the applicable air quality standards for ozone and $PM_{2.5}$. *Id.* at 48208. EPA projected that the Transport Rule would allow a number of downwind states to meet, in accordance with statutory deadlines, their ozone attainment and maintenance obligations, and almost all to meet similar obligations for $PM_{2.5}$. *Id.* at 48210.

EPA estimated that the reductions in fine particle pollution under the Transport Rule would, starting in 2014,

> [A]nnually reduce between 13,000 and 34,000 PM2.5-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma while also reducing 10 million days of restricted activity due to respiratory illness and approximately 1.7 million work-loss days.

Id. at 48309. EPA calculated that "the annual net benefit (social benefits minus social costs)" of the Transport Rule in 2014 would be $110 to $280

billion, with compliance costs totaling $1.85 billion in 2012 and less than $1 billion in 2014. *Id.* at 48313-14.

In formulating the Transport Rule, EPA performed a two-step analysis to determine which states were subject to the Rule, and for those states, to evaluate their "significant contributions" to downwind nonattainment. First, based on air pollution transport modeling and monitoring data, the agency excluded many states from regulation: if a state's contributions to air quality monitors in downwind nonattainment and maintenance areas never exceeded one percent of the relevant national ambient air quality standard, it was not subject to the Rule. *Id.* at 48211, 48236-37. Second, for the states not excluded, EPA applied cost-effectiveness and air quality factors to determine the amount of each state's significant contribution and abatement obligation. EPA then established emissions budgets incorporating safeguards (in response to *North Carolina*) to allow limited interstate trading consistent with ensuring timely reductions in interstate pollution. See *id.* at 48210-12, 48214, 48246-48.

Having previously found that states had not amended their implementation plans to meet their Good Neighbor obligations within the three-year statutory time period, EPA implemented the Rule via federal implementation plans pursuant to Section 110(c)(1) of the Act. Section 110(c)(1) provides that EPA "shall" promulgate a federal plan "within 2 years after" EPA either (1) finds that a state failed to submit an adequate state implementation plan that complies with statutory requirements; or (2)

disapproves a state's plan. See 76 Fed. Reg. at 48217. Beginning in 2014, the Rule allowed states to submit state implementation plans, for EPA's approval, that would modify or replace the federal implementation plans. See *id.* at 48327-28. In adopting federal plans, EPA explained that it lacked authority to extend Section 110(a)(1)'s three-year deadline for state plan submissions or alter Section 110(c)(1)'s unambiguous trigger for starting the two-year clock by which EPA must promulgate a federal plan. *Id.* at 48219-20. EPA also pointed to the *North Carolina* court's "emphasis on remedying CAIR's flaws expeditiously." *Id.* at 48210.

F. Proceedings on Judicial Review.

On August 21, 2012, a divided D.C. Circuit panel granted petitions for review from upwind states and industry and vacated the Transport Rule. The court interpreted the Act, *North Carolina* and *Michigan* as creating a set of "red lines" limiting EPA's authority under the Good Neighbor provision, App. 22a: (1) "once EPA reasonably delegates some level of contribution as 'insignificant' under the statute, it may not force any upwind State to reduce more than its own contribution to that downwind state minus the insignificant amount," App. 23a; (2) the "collective burden" of reducing interstate pollution "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment," App. 25a; and (3) the "combined obligations of the various upwind States, as aggregated," must "not go beyond what is necessary for the downwind states to achieve the NAAQS." App. 27a.

The majority next concluded that the Rule crossed each of these statutory "red lines." The "most fundamental[]" problem was the possibility the restrictions imposed by the Rule in the second step of its methodology "could require upwind states to reduce emissions by more than the amount" EPA had used to exclude states from program coverage in the first step, App. 31a, 35a, *i.e.*, to require abatement of contributions that were less than 1% of the NAAQS in the relevant downwind state. App. 31a-36a. In a lengthy footnote, App. 32a-34a n.18, the majority rejected EPA's contention that this statutory argument was barred by 42 U.S.C. 7607(d)(7)(B) because no one raised it in the rulemaking comment period.

The majority next concluded that the Transport Rule violated "the statute's proportionality requirement," because, the opinion said, EPA had "made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." App. 38a-39a. In addition, the majority concluded that the Rule "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." App. 39a.

The majority held that the Rule was invalid for a second, independent reason, namely, that EPA had implemented it "without giving the States an initial opportunity to implement the obligations themselves through State Implementation Plans." App. 42a. As noted above, after the *North Carolina* decision, EPA had found that none of the states subject to the

Transport Rule had submitted approvable Good Neighbor plans. *Supra*, pp. 10-11. As part of the Transport Rule, the agency adopted federal implementation plans for these states pursuant to 42 U.S.C. 7410(c)(1), which obligates the agency to "promulgate a [federal plan]" within two years of such findings. The majority nonetheless held that the states had no obligation to submit Good Neighbor plans until EPA "defines or quantifies" their obligations. App. 47a. The majority denied that the challenge was a collateral attack on EPA's earlier disapproval findings, and hence jurisdictionally barred under 42 U.S.C. 7607(b)(1), which limits courts' jurisdiction to challenges filed within 60 days of EPA's action. App. 61a-62a n.34.

Judge Rogers filed a comprehensive dissent faulting the majority for "disregard[ing] limits placed on its jurisdiction, the plain text of the Clean Air Act, and the Court's settled precedent interpreting the same statutory provisions at issue." App. 65a. She concluded that the majority's invalidation of EPA's method for determining upwind states' obligations violated the "clear command" of the Act's express exhaustion requirement, because "[n]o objection was made during the Transport Rule administrative proceedings to EPA's approach, let alone its statutory authority." App. 67a. Judge Rogers also concluded that the challengers could not collaterally attack EPA's prior, unchallenged actions disapproving the state plans for Good Neighbor deficiencies. App. 74a-78a. She rejected as contrary to the plain statutory text the majority's conclusion that states have no Good Neighbor obligations until the EPA defines them. App. 85a-87a.

The dissent insisted that the majority's reasons for entertaining statutory challenges to EPA's "significant contribution" methodology were invalid and that it had ignored the administrative record in finding a statutory violation based on possible "over-control." App. 95a-110a. Judge Rogers (who was on the panels that decided both *Michigan* and *North Carolina*) concluded that the majority badly misapplied both cases. App. 112a, 116a.

Petitions for rehearing en banc were denied.

REASONS FOR GRANTING CERTIORARI

Bypassing statutory limits on its own authority, the D.C. Circuit majority imposed a set of detailed requirements not found in the statute and poorly suited to the complex realities of the interstate air pollution problem as documented by the administrative record. The decision, if uncorrected, will deprive downwind states and their residents of badly needed relief from interstate air pollution and will create unjustified obstacles to EPA's and states' ability to give effect to the Good Neighbor provision. This Court's review is warranted.

I. THE PANEL VIOLATED CLEAR STATUTORY LIMITS ON JUDICIAL REVIEW BY RESTING ITS DECISION ON THEORIES NO PARTY HAD PRESENTED TO THE AGENCY DURING THE RULEMAKING.

As this Court has insisted, "'courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred against objection made at the time appropriate*

under its practice,'" *Woodford v. Ngo*, 548 U.S. 81, 90 (2006) (quoting *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952); emphasis added in *Woodford*), and "[e]xhaustion concerns apply with particular force . . . when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)).

In order to facilitate timely and orderly implementation of its requirements, the Clean Air Act explicitly limits judicial review to issues properly raised during the administrative proceedings. 42 U.S.C. 7607(d)(7)(B); *supra*, p. 5. The court of appeals flagrantly disregarded this limitation. The court lacked authority to address what it characterized as the Transport Rule's "most fundamental[]" statutory flaw, see App. 31a, because, as the dissent explained, "[n]o objection was made during the Transport Rule administrative proceedings to EPA's approach, let alone its *statutory authority*, to use different, unrelated measures of significance for inclusion and budget-setting." App. 67a. The question "is not *close*." App. 96a.

The majority never identified anything in the Transport Rule's docket that satisfies the Act's explicit requirement that objections be raised during the public comment period. None of the grounds offered in the majority's lengthy footnote, see App. 32a-34a n.18, withstands scrutiny. For example, that the prior interstate transport proceedings involved the question "whether EPA has complied with the basic statutory limits on its authority," did not excuse parties' failure to raise particular

"objections." Nor did standard remand language in *North Carolina* (see App. 32a n.18) suffice to excuse a failure to raise statutory objections to EPA's two-step methodology, which had not been challenged in, and expressly left "undisturbed" by *North Carolina*, see 531 F.3d at 916-17. (Judge Rogers, the only member of the *North Carolina* panel to sit on this case, was of the view that EPA's approach in the Transport Rule was fully consistent with *North Carolina*). The court also pointed to comments made years earlier in the CAIR proceeding, but the D.C. Circuit has made clear that comments from prior rulemakings are insufficient under 42 U.S.C. 7607(d)(7)(B), see *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001)). And the fact that EPA had considered but not adopted "two air quality only approaches'" (App. 33a n.18), by no means excused the challengers' failure to raise their different, *statutory* theories "during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Section 7607(d)(7)(B) contains no futility exemption, and courts may "not read futility or other exceptions into statutory exhaustion requirement where Congress has provided otherwise." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001).[2]

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[2] The Court lastly cited two comments in the Transport rulemaking, one from Wisconsin that urged less reliance on costs to achieve *more stringent* regulation, and one from Tennessee that urged EPA to "consider" a lower cost threshold for states that can reduce their emissions below the contribution level EPA defined as significant. App. 34a n.18. Neither argued that the statute prohibited EPA's approach. See App. 98a-101a (dissent).

The diverse rationales in the court of appeals' footnote are far removed from the rule laid down in the statute, which is whether an objection was "raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Left uncorrected, this grab-bag of excuses would provide ready means for parties to disrupt the administrative and judicial processes by raising on review issues they had failed to raise below. See App. 65a-66a, 115a-116a.

The circumstances here illustrate, in an especially vivid way, the hazards of bypassing statutory exhaustion requirements. The panel overturned EPA's rule not because it found that the agency's methodology *actually* required even a single upwind state to reduce emissions below the 1% threshold the majority regarded as a statutory "red line," App. 22a; rather, the majority deemed the mere *possibility* of such a result to be fatal. See, *e.g.*, App. 35a (EPA's budgets "*could* require upwind States to reduce emissions by more than the [initial threshold] amount") (emphasis added).

Precisely because no participant in the rulemaking raised the objection, EPA had no reason during the rulemaking to model whether, in fact, the court's "red line" would be exceeded for any state. Indeed, after the challengers first presented the issue in their opening briefs, EPA analyzed the record evidence on this newly-raised objection and explained that "data in the record suggest that, at the cost thresholds used in the Rule, such a scenario is extremely *unlikely* to occur." EPA CA Br. 33; see also *id.* 33-34 n.20. It is highly doubtful that any party would have had Article III standing to press

any "over-control" claim had the issue been timely raised during the rulemaking, and had EPA demonstrated then that none of the states subject to the Transport Rule would be required to reduce emissions below the 1% threshold. See *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013) (discussing injury in fact requirement).

The court's departures from the statutory exhaustion requirements were not limited to the "over-control" issues. As the dissent noted, the challengers never (even in their briefs) raised the argument that the statute required "proportionality," App. 69a, and not a single commenter proposed the regime later invented by the majority as a supposed statutory requirement. Further, there was no agency record addressing the efficacy or feasibility of the majorit's approach.

For a court to prescribe, *sua sponte*, a set of untried rules on a highly technical matter like controlling multistate air pollution inverts the decisional structure created by Congress. *Cf. Am. Elec. Power Co., Inc. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("the first decider under the Act is the expert administrative agency, the second, federal judges"). The D.C. Circuit's bypassing of the Act's exhaustion requirement to reach statutory claims that had not been presented to the agency warrants this Court's correction.

II. THE COURT OF APPEALS IMPOSED RIGID REQUIREMENTS ON EPA'S IMPLEMENTATION OF THE GOOD NEIGHBOR PROVISION THAT ARE NOT FOUND IN THE STATUTE AND THAT DISREGARD THE REALITIES OF INTERSTATE AIR POLLUTION.

The court of appeals departed sharply from the proper role of a federal court reviewing the actions of an agency to which Congress had granted authority to implement a federal statute. As this Court has repeatedly insisted, the agency's interpretation "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-18 (2009) (citing *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843–844 (1984)). In an uncommonly stark way, however, the court of appeals majority improperly "impose[d] its own construction on the statute," *Chevron*, 467 U.S. at 843, in place of the agency's reasonable construction. Its decision, which will improperly constrain EPA's efforts to give the intended effect to an important provision of the Act, calls for this Court's review.

The regulatory context here is especially ill-suited for such a judicial imposition. As the record in this proceeding shows, mitigating interstate air pollution problems – especially those involving multiple upwind and downwind states, with pollution resulting from dynamic emissions activity that

quickly shifts in response to changes in power demand or control costs – is unusually complex and technically demanding. See Regulatory Impact Analysis, JA 3192-98; 76 Fed. Reg. at 48352-61; "Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co.*, 131 S. Ct. at 2539-40. The statutory text requiring each state to develop "adequate" plan provisions that "prohibit[]" "any" emissions activity that "will . . . contribute significantly to nonattainment in . . . any other State," 42 U.S.C. 7410(a)(2)(D)(i)(I), manifestly calls upon administrative judgment and technical expertise.

In *Michigan*, the D.C. Circuit recognized that the statutory language is ambiguous and provides no "criterion for classifying 'emissions activity' as 'significant,' 213 F.3d at 674. The court upheld EPA's two–step approach as a permissible statutory construction, including the agency's "decision to draw the 'significant contribution' line on a basis of cost differentials." See *id.* at 679. In *North Carolina*, the Court sustained the same two-step approach to defining upwind states' "significant contributions." See 531 F.3d at 917 ("Again, we do not disturb this approach"). EPA relied on these holdings and adhered to same basic two-step approach to defining significant contributions. See 76 Fed. Reg. at 48270-71, 48303-04.

In a jarring change of direction, the majority here held that EPA's twice-approved two-step methodology violated *unambiguous statutory language* in multiple respects. The decision's statutory analysis is hampered by a repeated

inversion of statutory exhaustion rules, in which EPA was repeatedly faulted for failing to rebut objections never made, and by the majority's complete failure to demonstrate that EPA's own explanations regarding its "significant contribution" methodology were unlawful or arbitrary. Far from performing the deferential review *Chevron* prescribes, the majority never even engaged with the agency's explanation of why its methodology appropriately implemented the statute and conformed to the D.C. Circuit's interpretation in *Michigan* and *North Carolina*. See 76 Fed. Reg. at 48270-71.

"Over-Control" Although the majority declared that EPA "did not try to take steps to avoid . . . over-control," App. 40a, this conclusion is simply "unsupported by the record," App. 113a (Rogers, J.). In fact, EPA projected that, even when fully implemented, the Rule would not reduce emissions enough in some nonattainment areas. 76 Fed. Reg. at 48210, 48232, 48247-48; App. 114a (Judge Rogers, concluding that "there is no support for the court's conclusion that the Transport Rule resulted in collective over-control."); Technical Support Document, Air Quality Modeling, JA 2466, 2470 (five areas are projected to have 24-hour $PM_{2.5}$ issues post-implementation, while ten sites in two areas (Houston, TX and Baton Rouge, LA) will have ozone problems); Technical Support Document, Alternative Significant Contribution Approaches Evaluated ("Alternative Approaches TSD"), JA 2311 (criticizing alternative methodology as potentially producing "substantial over-control"). Significantly, neither the court, nor the challengers, identified any

instance in which the Rule required greater reductions than necessary to achieve attainment.

Nor is there any basis in the statutory text for the court's singular focus on a hypothetical danger of "over-control." The Good Neighbor provision is not a "blank check" authorizing EPA to reduce air pollution indiscriminately. App. 22a. But neither is the provision a wooden nickel; it is aimed at actually *achieving* necessary restrictions on upwind pollution transport that downwind states need to protect their citizens' health and well-being. The text prescribes that measures to address interstate pollution must be "adequate," and must "prohibit[]" "any" emissions that will contribute significantly to nonattainment "or" interfere with maintenance of standards in downwind states. See *North Carolina*, 531 F.3d at 908 (transport rule "must actually require elimination of emissions" that contribute significantly to downwind nonattainment). All this must be done "consistent with the provisions of this [Act]," including the statutory attainment deadlines downwind states must meet. *Id.* at 911-12.

Evaluating the risk that a given methodology will go *too far* in controlling interstate pollution and the risk it will *not go far enough* requires a "complex balancing," *Am. Elec. Power Co.*, 131 S. Ct. at 2539, that is the job of agency policymakers, not judges. Here, EPA considered these problems and resolved them in a reasoned way. The court's analysis did not demonstrate that the agency's work was unreasonable or arbitrary and capricious, or even seriously engage with the agency's reasoning. The court's erection of a series of formidable bulwarks against the merest possibility of over-control – even

if undocumented – is altogether out of step with Congress's repeated amendments to the statute to strengthen controls on transported pollution, and with the history of upwind states' persistent under-control of interstate air pollution.

Proportionality. Addressing another statutory argument that the challengers had not raised, see App. 111a (dissent), the court concluded that the statutory text includes a "fair share" requirement, under which abatement obligations "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment." App. 25a; see also App. 26a-27a & n.15 (illustrated majority's proportionality rule with a numerical example involving how three upwind states contribute to nonattainment in one downwind state).

Nothing in the Act's language imposes any "proportionality" or particularized "fair share" requirement like that contained in the court's discussion.[3] To be sure, under the arbitrary and capricious standard, a claim of improper disparities among states' compliance obligations, if duly raised in comments, would demand a reasoned agency response. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). But judicial review of such a claim would require examining the legal and policy reasons given by the agency for its choices, its responses to

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[3] In *North Carolina*, the D.C. Circuit rejected EPA's use of fairness as a regulatory rationale because "what is an 'equitable governmental approach to attainment' is not among the objectives of [the Good Neighbor provision]." 531 F.3d at 918.

objections properly raised in comments, and the feasibility and probable consequences of alternative approaches. The court below, in contrast, looked at none of this, casting its proportionality rule instead as a peremptory statutory requirement.

The majority did note that EPA had considered "a proportional approach that reflected many of the essential principles described above," but "ultimately chose not to adopt that approach." App. 40a n. 24 (citing Alternative Approaches TSD, JA 2311-12). Unmentioned by the majority, however, were the facts that (1) no commenter in the rulemaking advocated for that approach, let alone claimed that that such an approach was required by statute, see App. 107a-108a (dissent); (2) EPA rejected this approach for a variety of candidly explained reasons, pointing out, *inter alia*, the risk of overburdening states that had already adopted controls and noting that the proportionality concept breaks down whenever more than one downwind state is involved, JA 2311-12; and (3) EPA's reasons for rejecting the approach were not challenged by any party.

The court's proportionality rule fares poorly under real-world conditions. Unlike the court's hypothetical, upwind states frequently contribute to nonattainment in multiple downwind states. *E.g.*, 76 Fed. Reg. at 48242-44, Tables V.D-5, V.D-6. Indeed, in considering a methodology requiring upwind states to reduce their emissions "by an amount that is proportional to their contribution," EPA explained that "most upwind states contribute to multiple downwind monitors (in multiple states) and would have a different reduction percentage for each one." Alternative Approaches TSD, JA 2312.

The court of appeals did not mention EPA's explanation, let alone show why it was wrong.[4]

If the Good Neighbor provision incorporates a "fair share" norm requiring equitable treatment of states, that norm does not preclude EPA from considering how much effort different upwind states have already made to control pollution. Under a standard that required upwind states to reduce emissions by "the same percent reduction of existing emissions," EPA explained,

> states that had previously implemented stringent control programs might not be able to achieve the required reductions using existing control technologies, while others that had previously done little (and presumably have larger absolute contributions) would achieve their required reductions using significantly less than optimal control technologies.

Alternative Approaches TSD, JA 2312. Certainly nothing in the concept of "fair share" compelled EPA to adopt the majority's approach. Indeed, even if the statute had *expressly* directed EPA to identify upwind states' "fair share" of emissions reductions, that broad term could not reasonably be interpreted to dictate one particular approach. *Cf. Verizon Communications, Inc. v. F.C.C.*, 535 U.S. 467, 501 (2002) (statutory prescription of "just and

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[4] The majority suggested that some departures from proportionality might be tolerable where necessary to "ratchet back" emissions control reductions to avoid "over-control." See App. 29a. But there is no textual or logical basis for making only this departure, and the majority's proportionality rule fails whenever states' emissions contribute to nonattainment in more than one downwind state.

reasonable" rates leaves methodology "largely subject to [agency] discretion").

Reliance on Cost. In *Michigan*, the D.C. Circuit explicitly approved EPA's reliance on uniform cost levels as a means of fixing states' "significant contributions" to nonattainment, over objections that doing so resulted in an improper lack of proportionality. 213 F.3d at 679. The majority here recast *Michigan* as having merely upheld rules "prevent[ing] exorbitant costs from being imposed on certain upwind States." App. 27a.[5]

There is no basis in the statute for limiting consideration of control costs to avoiding "exorbitant" costs. In the Transport Rule, EPA did not rely upon cost to weaken the Act's public health protections, see *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 465 (2001). Instead, the agency used control costs as a tool for assigning abatement obligations among states jointly responsible for downwind pollution, concluding that cost thresholds corresponding to differing levels of pollution-control effort, combined with air quality considerations, achieved the necessary reductions in an effective and efficient manner. See 76 Fed. Reg. at 48256. EPA explained that basing emissions limits in part on control cost thresholds had the advantage of taking account of whether upwind states had already taken steps to reduce their transported pollution.

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[5] In fact, the NO_x SIP Call methodology relied on a uniform cost standard based on what were judged to be "highly cost effective controls" and did not require a particular showing of extreme burdens, as the *Michigan* court definitely recognized. *See* 213 F.3d at 675-79.

Alternative Approaches TSD, JA 2312. The agency explained that approaches using air quality considerations alone could lead to extreme obligations for a few states while still failing to achieve adequate reductions. See *id.*, JA 2309-10 (evaluating "air quality only" approach and finding that for certain upwind states (Indiana, Kentucky, Ohio, and Pennsylvania) it would require reductions of 90% or more of all SO_2 and NO_x emissions (not just power plant emissions) using a 1%-of-NAAQS threshold, and of 69% or more even if the threshold were increased more than threefold).

Given the dynamic, cost-driven realities of the electric power industry, an interstate transport rule is unlikely to achieve its goal if it is not designed with costs in mind, as EPA discussed extensively. Suppliers of electricity "bid" to supply power to the interstate electric grid based largely on their operating costs, and system operators dispatch power based on those bids. Installation and operation of environmental controls can affect operating costs and can cause emissions to shift to units with fewer controls, causing more pollution. See 76 Fed. Reg. at 48255 (discussing "shifting of emissions between states" due to "interconnected nature of the country's energy system").

EPA's mixed cost and air quality approach was based upon extensive consideration of those realities. In developing the Rule, EPA used both an air pollution transport model, CAMx, and a model developed for the electric industry, the Integrated Planning Model ("IPM"), to evaluate how pollution control costs would shift dispatch, and how downwind air quality would be affected. JA 2333.

The statute permitted EPA to adopt a methodology attuned to real-world conditions, rather than a static analysis of oversimplified hypotheticals.

III. THE D.C. CIRCUIT'S RULING THAT EPA MUST QUANTIFY THE GOOD NEIGHBOR OBLIGATIONS OF UPWIND STATES BEFORE THOSE STATES NEED TO REDUCE THEIR EMISSIONS LACKS ANY STATUTORY BASIS.

The court of appeals' ruling that states have no obligation to include Good Neighbor reductions in implementation plans until EPA has quantified their obligations, App. 45a-48a, was jurisdictionally barred, strayed far from the text of the Act, and disrupts settled state and EPA practice.

First, as the dissent explained, App. 69a-94a, the challenge to EPA's reliance on federal implementation plans was barred by the Act's express limits judicial review. Following the *North Carolina* decision, EPA disapproved state plans in all of the states covered by the Transport Rule because of the absence of adequate Good Neighbor measures. Those actions triggered an unambiguous statutory obligation to promulgate federal plans. 42 U.S.C. 7410(c)(1) (Administrator "shall promulgate" federal implementation plan "at any time within 2 years" after failure finding or SIP disapproval). States that sought to challenge EPA's conclusion that their plans were inadequate with respect to interstate transport, and that wished to stop the mandatory statutory deadline for federal plans had 60 days to challenge EPA's disapproval. See 42 U.S.C. 7607(b)(1). Only three parties (Georgia, Kansas, and a Kansas-based firm) filed such challenges, and their (still-pending)

challenges were not part of the challenge to the Transport Rule. See App. 74a & n.5 (dissent, citing these separate challenges). The majority lacked jurisdiction to entertain these collateral challenges in the instant case. See App. 73a-82a.

Second, the language of the Act does not support the court's ruling that EPA must quantify Good Neighbor obligations before the state planning process can begin. To the contrary, the text of the Good Neighbor provision puts the obligation directly on the state as part of its initial plan submission: "[E]ach [state implementation] plan shall . . . contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State[.]" 42 U.S.C. 7410(a)(2)(D)(i)(I). The majority noted that the states have no obligation to implement an ambient air quality standard until EPA has set the concentration level of such standard, and then analogized that states have no obligation to address pollution transport in their plans until EPA specifies the quantity that they must abate. App. 53a. But, as Judge Rogers explained, the analogy between states' interstate transport obligations and their obligations regarding new or amended air quality standards is unmoored from the "plain text." See App. 84a-86a. States' obligation to develop amendments to its implementation plan to eliminate "significant contribution" to downwind nonattainment of *previously established* air quality standards comes directly from the statute. *Id.* [6]

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[6] The majority's argument that Section 126 of the Act, 42 U.S.C. 7426, supports its EPA-first approach, App. 54a-55a, also is unmoored from the text. As the dissent explained, "[t]he

As the dissent explained, "[t]he plain text [of 42 U.S.C. 7410(c)(1)] requires that within three years of EPA's promulgation of [an air quality standard], States *shall* submit SIPs, and those SIPS *shall* include adequate good neighbor provisions." App. 85a. Under the statute's plain language, States have a direct obligation to ensure that their implementation plans contain adequate provisions to prohibit significant contribution. They must submit such provisions for EPA approval or disapproval. 42 U.S.C. 7410(a)(1), (2). That obligation to adopt and submit measures to prevent significant contribution exists whether or not EPA has promulgated regulations quantifying "significant contribution."

The majority's ruling that EPA must first quantify the Good Neighbor obligations of states ignores the Act's explicit requirement that states "provide for . . . performance of such air quality modeling as [EPA] may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant" covered by an air quality standard. 42 U.S.C. 7410(a)(2)(K). Pursuant to this requirement, states have regularly performed the type of quantification analysis that the majority assumed they cannot do. See, *e.g.*, 76 Fed. Reg. 53638 (Aug. 29, 2011) (approving a Good Neighbor plan from Delaware). States have also formed regional coalitions in order to perform complex air quality modeling. See 77 Fed. Reg. 45992, 46004 (Aug. 2,

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majority's "comparison of section 110 to section 126 . . . conflates direct federal regulation of *sources* with EPA's statutory authority to enforce requirements that *States* comply with their 'good neighbor' SIP obligations[.]" App. 85a, n.9.

2012). Like EPA, States analyze power sector emissions using sophisticated computer programs. See, *e.g.*, 77 Fed. Reg. 38501, 38506 (June 28, 2012) (southeastern states conducted "air quality modeling" and "generated future-year emissions inventories for the electric generating sector of the contiguous United States using [IPM]").

The majority's conclusion that upwind states have no Good Neighbor obligations until EPA specifies a numerical standard is contradicted by the statutory text (which says otherwise) and by common sense. The majority managed to abandon a statute containing an unambiguous "shall" obligation because it believed language of the Good Neighbor provision, like a traffic sign that says "drive 'carefully,'" does not provide sufficiently "precise guidance" to upwind states, App. 51a; but laws that establish general, but still obligatory, norms are ubiquitous, from common-law negligence and nuisance to statutory prohibitions against "unreasonable restraints of trade." "Good neighbors" do not have to be told exactly how many decibels they may blast their stereos before becoming a nuisance – even though, if necessary, the police officer will tell them. Neither the fact of interstate pollution nor the means of abating it are impenetrable mysteries; abatement frequently involves well recognized techniques such as requiring high-emitting sources to operate installed pollution controls. See 76 Fed. Reg. at 48250-52. States (including the many states that have never been covered by EPA's regional transport rules) regularly prepare plans addressing transport. See, *e.g.*, 77 Fed. Reg. 1027 (Jan. 9, 2012) (approval of

Colorado interstate transport plan); 72 Fed. Reg. 41629 (July 31, 2007) (approval of Arizona interstate transport plan).

The ruling imposes a regulatory hurdle that does not exist in the Act, and places the resulting burden of inertia on the downwind states and their residents, compounding the delays and under-control of interstate pollution the Good Neighbor provision was intended to remedy. This Court's review is warranted.

IV. THE CASE PRESENTS ISSUES OF VITAL NATIONAL IMPORTANCE THAT WARRANT THIS COURT'S REVIEW

The Transport Rule was crafted to provide downwind states with relief from cross-border pollution that interferes with their ability to meet and maintain health-based air quality standards. The stakes for public health are high. EPA found that the Rule would save tens of thousands of lives annually, and avoid hundreds of thousands of serious illnesses. See *supra*, p. 11.[7]

The subject-matter of this case makes this Court's intervention particularly important. States injured by trans-border pollution rightfully expect the federal government to bear "the duty of providing a remedy," *Missouri,* 180 U.S. at 241, for harms the downwind states themselves are without power to address. Interstate pollution misdirect the forces of interstate competition; states favored by geography

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[7] Designed to remedy the predecessor rule's flaws, the Transport Rule provides greater health benefits than CAIR. See Dec. of David Schoengold, Ex. A to Intervenors' Dec. 1, 2011, Stay Opp. (D.C. Cir. Doc. 1345215).

or wind patterns can export the social costs of their economic activity, securing an advantage over neighboring states (and companies located there). Some downwind states are unable, due to interstate pollution, to meet air quality standards even after imposing abatement obligations upon local sources far more demanding than upwind states have imposed.[8] Downwind states stymied by interstate pollution are not excused from the Act's attainment deadlines. See *Sierra Club v. EPA*, 294 F.3d 155, 160 (D.C. Cir. 2002); *Sierra Club v. EPA*, 311 F.3d 853, 860 (7th Cir. 2002); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002).

The decision below has left the law governing the pivotal Clean Air Act provision in disarray. The effect of the decision is to restore a prior rule, CAIR, that the D.C. Circuit, in *North Carolina*, has declared to have "fundamental flaws," including its failure to provide downwind states with adequate protection within the statutorily mandated deadlines. Both the prior rule, and this one, were crafted (by successive Administrations) in efforts to conform to the D.C. Circuit's guidance.

The D.C. Circuit's commands to EPA as to how the statute is supposed to work now point in opposite directions: In *North Carolina*, the court faulted EPA for failing to ensure that emission reductions from upwind states would occur in time for downwind states to meet their statutory nonattainment

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[8] See Conn. Dept. of Envtl. Prot., Comments (JA 1227-29); Md. Dep't of the Envt., Comments (JA 586); N.Y.S. Dep't of Envtl. Cons., Comments (JA 928).

deadlines – an interest that EPA strove to satisfy with the timing of its rule. The court here, however, laid out a set of substantive strictures and procedural rules that give no weight to the central statutory goal of providing speedy relief for downwind states. See App. 93a-94a, 114a (dissent). While the majority did not purport to overturn the prior D.C. Circuit decisions approving regional transport programs based in part on cost considerations, the court's various methodological strictures appear to eliminate EPA's ability to do so in practice. The majority's instructions on proportionality conflict not only with *Michigan*'s explicit rejection of the same argument, 213 F.3d at 679, but, in a large class of cases, with basic arithmetic. See *supra*, p. 26. Its lack of consideration for the practical and legal concerns that led EPA to support its two-step methodology will unduly complicate the agency's ability to give effect to the statute going forward.

Heightening the importance of the case are the many ways in which EPA's transport rules are interwoven with the air quality planning processes of upwind and downwind states, and with the implementation of other federal and state programs. Moreover, the air quality standards to which the Good Neighbor provision is tied must be periodically reviewed and revised, 42 U.S.C. 7409(d)(1); see *Am. Trucking Ass'ns*, 531 U.S. at 463, and new nonattainment areas designated. See 77 Fed. Reg. 30088 (May 21, 2012) (designating 45 areas (including 7 multistate areas) as nonattainment for the 2008 ozone NAAQS); see also 77 Fed. Reg. 34221 (June 11, 2012) (additional designations); 78 Fed.

Reg. 3086 (Jan. 15, 2013) (revised standard for $PM_{2.5}$). The questions with which the D.C. Circuit has struggled for more than a decade will recur.

The court of appeals' repeated bypass of statutory exhaustion requirements – and its embrace of numerous easily manipulated theories to excuse a failure to present objections – are also of broad public significance. The D.C. Circuit is the sole forum for judicial review of national Clean Air Act rulemakings, 42 U.S.C. 7607(b)(1), and has a singular role reviewing rulemakings under a host of major regulatory statutes with exhaustion requirements.[9] The decision here is apt to encourage "blindsiding" of agencies, see App. 114a, and the majority's long menu of rationales for bypassing clear limits on judicial review, App. 32a-34a n.18, *supra*, pp. 17-18, injects costly uncertainty into rules that form the foundation of administrative law.

The court of appeals' violation of bedrock rules of administrative procedure, its disregard of the agency's own analysis (even as the majority took up objections not presented to the agency), and its willingness to impose detailed methodological requirements on EPA without any examination of their feasibility are ironic given the long and unhappy background of *judicial* efforts to handle the chronic problem of interstate pollution:

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[9] See, *e.g.*, 47 U.S.C. 405(a)(2) (Communications Act); 15 U.S.C. 77i(a) (Securities Act of 1933); 15 U.S.C. 78y(c)(1) (Securities Exchange Act of 1934); 29 U.S.C. 160(e) (National Labor Relations Act); 29 U.S.C. 210(a) (Fair Labor Standards Act); *Nat'l Mining Ass'n v. MSHA*, 512 F.3d 696, 700 (D.C. Cir. 2008) (such provisions are "common" in "many regulatory statutes").

> History reveals that the course of this Court's prior efforts to settle disputes regarding interstate air and water pollution has been anything but smooth. In *Missouri v. Illinois*, 200 U.S. 496, 520—522 (1906), Justice Holmes was at pains to underscore the great difficulty that the Court faced in attempting to pronounce a suitable general rule of law to govern such controversies.

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493, 501 (1971). See also *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981) ("[D]ifficult" "technical problems" associated with water pollution control were "doubtless the reason Congress vested authority to administer the Act in administrative agencies possessing the necessary expertise."). The court of appeals forgot these important lessons, at great cost to downwind states and their millions of residents.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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OPPOSITION BRIEF

Nos. 12-1182, 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P. *et al.*,

Respondents.

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

The Clean Air Act's "good-neighbor" provision requires upwind States to prohibit sources within their borders from "emitting any air pollutant in amounts" that "contribute significantly" to downwind States' "nonattainment" of national ambient air quality standards ("NAAQS"). 42 U.S.C. §7410(a)(2)(D)(i)(I). Pursuant to this provision, the Environmental Protection Agency ("EPA") issued a regulation, known as the Transport Rule, requiring upwind States to make emissions reductions without regard to whether the reductions mandated in a particular State were greater than necessary to eliminate that State's significant contribution to downwind States' nonattainment of the NAAQS, and without regard to whether the overall reductions mandated in the upwind States were greater than necessary for the downwind States to achieve attainment.

The questions presented are:

1. Whether the court of appeals correctly held that the challenges to the Transport Rule on which the court granted relief were adequately presented to EPA and preserved for judicial review.

2. Whether the court of appeals correctly held that the States must be given the initial opportunity to implement the reductions required by EPA under the good-neighbor provision.

3. Whether the court of appeals correctly held that the Transport Rule exceeded EPA's statutory authority to prohibit only those "amounts" of emissions that "contribute significantly" to downwind States' "nonattainment" of the NAAQS.

RULE 29.6 STATEMENT

AEP Texas North Company is a wholly owned subsidiary of AEP Utilities, Inc. AEP Utilities, Inc., Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma, and Southwestern Electric Power Company are wholly owned subsidiaries of American Electric Power Company, Inc. American Electric Power Company, Inc. has no parent, and no publicly held corporation owns ten percent or more of its stock.

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally friendly circulating fluidized bed ("CFB") boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Big Brown Lignite Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Dairyland Power Cooperative is a non-stock, not-for-profit cooperative association organized under the laws of the State of Wisconsin, with its principal office located in La Crosse, Wisconsin. Dairyland is engaged, among other things, in the business of generating and transmitting electric power to its 25 member distribution cooperatives and to other wholesale customers. Dairyland has no corporate parent. No publicly held corporation owns a 10% or greater ownership interest in Dairyland.

EME Homer City Generation, L.P. ("EME Homer City") is a limited partnership composed of Mission Energy Westside, Inc., a California corporation, as the general partner and Chestnut Ridge Energy Company, a California corporation, as the limited partner. Mission Energy Westside, Inc. and Chestnut Ridge Energy Company are wholly owned subsidiaries of Edison Mission Holdings Company, which, in turn, is a wholly owned subsidiary of Edison Mission Energy. Edison Mission Energy is a Delaware Corporation, which is a wholly owned subsidiary of Mission Energy Holdings Company, a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison Mission Group, Inc., a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison International, a California corporation.

On May 2, 2013, EME Homer City filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois. EME Homer City has requested that the bankruptcy court jointly administer its case (13-18703) with the lead case, *In re Edison Mission Energy*, Case No. 12-49219 (JPC).

When EME Homer City filed its petition in the Court of Appeals, EME Homer City was the lessee

and operator of the Homer City generating station, a coal-burning electric power facility that is affected by the Transport Rule. Edison Mission Energy is an independent power producer that generates electricity to sell wholesale in the open market. The ultimate parent company, Edison International, is engaged in the business of holding for investment the common stock of its subsidiaries which also include Southern California Edison, a California public utility corporation, and Edison Capital, which has investments in energy and infrastructure projects worldwide. In addition, the following parent companies, or affiliates of EME Homer City have outstanding shares that are in the hands of the public: Edison International and Southern California Edison.

Entergy Corporation is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in Entergy Corporation.

Environmental Energy Alliance of New York, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

The Florida Electric Power Coordinating Group, Inc., ("FCG") is a non-profit, non-governmental corporate entity organized under the laws of Florida. The FCG does not have a parent corporation. No publicly held corporation owns ten percent or more of the FCG's stock.

International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") is an unincorporated international labor organization with headquarters in Washington, D.C. The IBEW provides collective bargaining representation and other services to its members, and collective bargaining representation to all members of collective bargaining units it exclusively represents. The IBEW represents electrical workers in the Unit-

ed States, Canada, and the Republic of Panama, engaged in the manufacture, assembling, construction, installation, and erection, repair or maintenance of all materials, equipment, apparatus and appliances required in the production, generation, utilization and control of electricity and its effects, and transmission of data, voice, sound, video and other emerging technologies (including fiber optics, high speed data cable, etc.). The IBEW has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Corporate Disclosure Statement because it is a governmental entity organized under the laws of the state of Kansas. Accordingly, no Corporate Disclosure Statement is being provided.

The Lafayette Utilities System, a department within the Lafayette City-Parish Consolidated Government, is a local government utility primarily servicing the citizens of the City of Lafayette, Louisiana. As a customer-owned municipal utility, the Lafayette Utilities System's mission is to provide its customers with quality and affordable electric, water, wastewater and fiber optic services. The Lafayette Utilities System does not issue stock; it does not have a parent corporation, and no publicly held corporation holds any Lafayette Utilities System stock.

The Louisiana Chemical Association has no parent companies, and no publicly held company has a 10% or greater ownership interest. The Louisiana Chemical Association is a non-profit Louisiana corporation formed in 1959. Its mission is to promote a positive climate for chemical manufacturing that ensures

long-term economic growth for its members. It is a "trade association."

Luminant Big Brown Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Energy Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Holding Company LLC is the parent company that wholly owns Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, and Luminant Energy Company LLC (collectively, the "Luminant Entities"). Luminant Holding Company LLC is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"). EFCH is a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."), formerly TXU Corp. Substantially all of the common stock of EFH Corp is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater ownership interest in EFH Corp.

Luminant Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

The Midwest Ozone Group is an unincorporated association of businesses and organizations formed to assist in the development of scientifically sound and effective air quality strategies. The Midwest Ozone Group has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in the Midwest Ozone Group.

National Mining Association ("NMA") is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public, although NMA's individual members have done so.

The National Rural Electric Cooperative Association ("NRECA") is the national association of rural electric cooperatives. NRECA does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Northern States Power Company – Minnesota is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Northern States Power Company – Minnesota.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Peabody Energy Corporation is a publicly traded company on the New York Stock Exchange ("NYSE") under the symbol "BTU." As of March 31, 2013 filings, no holding companies own more than 10% of Peabody Energy Corporation's outstanding shares.

San Miguel Electric Cooperative, Inc. is a 400 MW, mine-mouth, lignite-fired electric generating unit located in Atascosa County, Texas roughly 45 miles south of San Antonio. San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. and South Texas Electric Cooperative, Inc. San Miguel is a not-for-profit electric cooperative incorporated in the State of Texas under the Electric Cooperative Corporation Act, Tex. Util. Code, Chapter 161. San Miguel does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public and no publicly owned company has an ownership interest in San Miguel.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Southern Company Services, Inc., Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, and Southern Power Company are all wholly owned subsidiaries of

Southern Company, which is a publicly held corporation. Other than Southern Company, no publicly held company owns 10% or more of any of these Respondents' stock. No publicly held company holds 10% or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—as well as Southern Power Company, which owns generation assets and sells electricity at market-based rates in the wholesale market. These subsidiaries, each a Respondent here, operate more than 42,000 megawatts of coal, natural gas, oil, nuclear, and hydroelectric generating capacity. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for the operating companies.

Southwestern Public Service Company is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Southwestern Public Service Company.

Sunflower Electric Power Corporation is a Kansas non-profit corporation doing business as a cooperative with its principal place of business in Hays, Kansas. It is not a publicly held corporation; no publicly held

corporation holds any ownership interest in it and it has no "parent" corporation. It is owned solely by its seven member distribution cooperatives, all of which are located in western Kansas. Sunflower Electric Power Corporation is engaged in the generation, transmission and sale of electric power and energy at wholesale to its member distribution cooperatives and municipalities in the state of Kansas.

United Mine Workers of American ("UMWA") is a non-profit national labor organization with headquarters in Triangle, Virginia. UMWA's members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. UMWA is affiliated with the American Federation of Labor-Congress of Industrial Organizations. UMWA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

The Utility Air Regulatory Group ("UARG") is a not-for-profit association of individual electric utilities and electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10% or greater ownership interest in UARG.

Westar Energy, Inc., a publicly traded Kansas corporation with its principal place of business in Topeka, Kansas, is the parent corporation of Kansas Gas and Electric Company ("KGE"), a Kansas corporation with its principal place of business in Topeka, Kansas. Westar and its wholly owned subsidiary, KGE,

are electric utilities engaged in the generation, transmission, distribution and sale of electric power and energy at wholesale and retail to approximately 687,000 customers in the state of Kansas. Westar owns all of the stock of KGE. In addition to Westar's publicly traded stock, both Westar and KGE have issued debt and bonds to the public. There is no corporation that owns 10% or more of the stock of Westar Energy, Inc.

Western Farmers Electric Cooperative ("WFEC") hereby certifies that no publicly held company has a 10 percent or greater ownership interest in WFEC. WFEC is a non-profit generation and transmission rural electric cooperative that supplies wholesale electricity to its member owners, which include 19 rural electric distribution cooperatives located in Oklahoma and 4 distribution cooperatives located in New Mexico.

Wisconsin Public Service Corporation ("WPSC") is a wholly owned subsidiary of the publicly owned corporation Integrys Energy Group, Inc (NYSE: TEG). WPSC is a regulated electric and natural gas utility operating in northeast and central Wisconsin and an adjacent portion of Upper Michigan.

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Industry and Labor Respondents respectfully submit this brief in opposition to the petitions for certiorari filed by the Environmental Protection Agency, *et al.* ("EPA") and the American Lung Association, *et al.* ("ALA").

STATEMENT OF THE CASE

1. The Clean Air Act ("CAA") requires EPA to establish national ambient air quality standards ("NAAQS") for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7408(a)(1)(A); *see also id.* §7409. It also requires EPA to designate areas of the country as "attainment," "nonattainment," or "unclassifiable" for each such air pollutant, depending on whether the area meets the NAAQS. *Id.* §7407(c), (d). Although EPA sets the NAAQS, each State has "the primary responsibility for assuring air quality" within its borders, *id.* §7407(a), and must develop a state implementation plan ("SIP") to meet the NAAQS and submit its SIP to EPA for approval, *id.* §7410.

The CAA also contains a "good-neighbor" provision. Section 110(a)(2)(D)(i)(I) requires that SIPs "contain adequate provisions" prohibiting "any source ... within the State from emitting any air pollutant in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* §7410(a)(2)(D)(i)(I). As pertinent here, various sources, including power plants, emit sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x"), which can contribute to a downwind State's nonattainment of the particulate matter ("$PM_{2.5}$") and ozone NAAQS. 76 FR 48208, 48209-10 (Aug. 8, 2011).

In 1998, EPA issued the "NO_x SIP Call," which instructed upwind States to revise their SIPs to mitigate downwind ozone formation by imposing NO_x emissions limits. 63 FR 57356 (Oct. 27, 1998). The D.C. Circuit largely upheld the NO_x SIP Call in *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000) (per curiam).

In 2005, EPA promulgated the Clean Air Interstate Rule ("CAIR"), which addressed interstate transport of NO_x and SO_2. 70 FR 25162 (May 12, 2005). CAIR required upwind States to achieve EPA-specified "emissions budgets" reflecting emissions reductions for each State that EPA determined were cost-effective.

In *North Carolina* v. *EPA*, the D.C. Circuit invalidated CAIR because EPA had not tailored its budgets to individual upwind States' emissions that actually "contribute significantly" to downwind nonattainment. 531 F.3d 896, 907-08 (D.C. Cir.) (per curiam), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam). *North Carolina* rejected EPA's effort to reallocate emissions-reduction burdens among the States in a way the agency considered "fai[r]." *Id.* 918-19. It held that §110(a)(2)(D)(i)(I) "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions"; rather, "[e]ach state must eliminate its own significant contribution to downwind pollution," and EPA "may not require some states to exceed the mark." *Id.* 921. The D.C. Circuit remanded, but allowed CAIR to remain in place while EPA developed a new rule. 550 F.3d at 1178.

In response, EPA issued the Transport Rule. EPA initially determined which downwind States would have problems "attaining" or "maintaining" NAAQS in 2012 assuming CAIR would not be in effect. 76 FR

at 48211. EPA relied on computer modeling to make this hypothetical future air-quality projection using 2005 base-year data rather than "the most recent ambient data" that showed improvements in actual air quality in the covered States. *Id.* 48229-30.

After identifying projected downwind "nonattainment" and "maintenance" locations, EPA employed a two-stage approach to determine (1) whether to regulate an upwind State's emissions and (2) the emissions budget for that State. At the first stage, EPA used its air-quality models to predict the amount each upwind State would "contribute" to the "nonattainment" and "maintenance" locations it had identified (again, assuming, counterfactually, that CAIR was not in effect). *Id.* 48233-36. To determine which upwind States to regulate, EPA set air-quality contribution thresholds at 1% of each NAAQS. *Id.* 48236. States whose contributions to a nonattainment or maintenance location were predicted to exceed this threshold were deemed "linked" to that location and subjected to emissions budgets. *Id.* Conversely, EPA determined that "states whose contributions are below these thresholds do *not significantly contribute* to nonattainment," *id.* (emphasis added), and thus were not subject to any emissions budgets, *see also id.* 48237 (the 1% threshold "identif[ies] states whose contributions *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS") (emphasis added).

For upwind States with predicted contributions exceeding these "insignificance" thresholds, EPA's second stage imposed emissions limits based on the cost of reducing emissions. EPA identified the emissions reductions available at various "cost thresholds" and then set emissions budgets reflecting the "amounts" of emissions EPA projected would remain if emissions

were eliminated at a dollar-per-ton cost equal to those cost thresholds. *Id.* 48248-52, 48258. For 2012 budgets, EPA used a $500/ton threshold for both SO_2 and NO_x—*i.e.*, EPA calculated the amount of SO_2 and NO_x emissions each State could reduce for $500 per ton of emissions. *Id.* 48252, 48257–59.[1]

Notwithstanding objections raised by commenters, CAJA556, 1293, 1756, EPA did not attempt to determine an individual State's downwind "contribution" after imposition of emissions controls, let alone determine whether the emissions controls would drive a State's "contribution" below the insignificance threshold it had determined in stage-one "d[id] not significantly contribute to nonattainment or interfere with maintenance," 76 FR at 48236. Instead, EPA set emissions limits based on its view of "reasonable" and "cost-effective" emissions reductions that could be undertaken by upwind States collectively.[2]

Moreover, although §110(a)(2)(D)(i)(I) authorizes reductions only of emissions that contribute significantly "to nonattainment" or "interfere with maintenance" of NAAQS, EPA never considered whether the emissions reductions it directed were greater than necessary to achieve or maintain the relevant NAAQS, 76 FR at 48256-57, even though EPA's own data showed that the agency was imposing emissions

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[1] For 2014 budgets, EPA split the States into two groups for SO_2, using $2,300/ton for Group 1 and $500/ton for Group 2. 76 FR at 48252, 48257. The 2014 NO_x budgets used the $500/ton threshold. *Id.* 48257.

[2] *See, e.g.*, 76 FR at 48249 (setting controls at the "point where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective"); *id.* 48257 (EPA's controls achieved "significant air quality improvements" with "cost impacts [that] remained reasonable").

reductions far greater than necessary for downwind States to achieve attainment, CAJA2546-637, and despite data demonstrating that less stringent emissions limits would still result in downwind attainment, CAJA1066-68, 1374. Nor did EPA consider the extent to which projected nonattainment resulted from the downwind States' own in-state pollution. *See, e.g.*, 75 FR 45210, 45226, 45241 (Aug. 2, 2010); 76 FR at 48248, 48259.

2. The D.C. Circuit vacated the Transport Rule, finding that it exceeded EPA's authority under §110(a)(2)(D)(i)(I) in "at least three independent" respects relevant here. EPA.Pet.App. 31a.

First, the court found EPA's approach for setting emissions budgets unlawful because those limits were not based on "'amounts' from upwind States that 'contribute significantly to nonattainment' in downwind States." *Id.* EPA first defined "amounts" of air-quality contribution that were "insignificant," but then "ignore[d]" that threshold and defined emissions budgets "in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a.[3]

Second, the court found that the Transport Rule unlawfully imposed reductions greater than necessary for downwind States to attain NAAQS. Under §110(a)(2)(D)(i)(I), EPA may only "targe[t] those

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[3] The court also found EPA's approach "illogical" and that EPA's justification "rings hollow." *Id.* 36a, 37a n.22. As the court noted, "EPA itself said in the final rule that 'states whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS,'" yet EPA simultaneously adopted an approach that could arbitrarily require a State to reduce emissions below those thresholds. *Id.* 36a.

emissions from upwind States that 'contribute significantly *to nonattainment*.'" *Id.* 28a. Thus, "EPA may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS." *Id.* 39a-40a. The court found, however, that "EPA did not try to take steps to avoid such over control." *Id.* 40a.

Third, the court found the Transport Rule violated *North Carolina*'s holding that EPA may not force a State to "'share the burden'" of reducing another State's emissions. *Id.* 38a. Here, the court rendered two related, yet distinct, holdings. It first held that EPA violated the good-neighbor provision because it "made no attempt to calculate ... on a proportional basis ... contributions of other upwind States to the downwind States' nonattainment problems." *Id.* 39a. The court also held that EPA "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." *Id.* In other words, EPA could not require upwind States to reduce emissions to compensate for downwind State emissions that caused NAAQS to be exceeded. *Id.* 26a & n.15, 39a.

The court recognized, however, that "multiple upwind States may affect a single downwind State" and "a single upwind State may affect multiple downwind States." *Id.* 29a. The court held that EPA had "discretion" to account for these complexities and was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not ... possible" to do so. *Id.* The court required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a-29a.

3. The court vacated the Transport Rule but directed EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* 64a.

Under CAIR, virtually all downwind locations in the eastern United States (the area of concern in the Transport Rule proceedings) have attained the relevant NAAQS. EPA, *Progress Report 2011: Environmental and Health Results* 12, 14 (2013) ("*2011 Progress Report*"), *available at* http://www.epa.gov/airmarkets/progress/ARPCAIR11_downloads/ARPCAIR11_environmental_health.pdf.

REASONS FOR DENYING THE PETITIONS[4]

Petitioners do not claim the decision below conflicts with any other decision or presents any broadly recurring legal issue. Instead, petitioners argue that the court of appeals erred and that there will be adverse health consequences unless the Transport Rule is reinstated.

Petitioners fail to demonstrate any error in the decision below, let alone error warranting review. In the Transport Rule, EPA mandated that upwind States make whatever emissions reductions the agency deemed "reasonable" and "cost-effective" without regard to whether those "amounts" "contribut[ed] significantly to nonattainment." The court of appeals correctly held that this approach had no basis in the statute. While other provisions of the CAA authorize EPA to require further emissions reductions, §110(a)(2)(D)(i)(I) permits EPA only to require an upwind State's SIP to "prohibi[t] [emissions] within the State [of] any air pollutant in amounts which will ... contribute significantly to nonattainment" of NAAQS in any downwind State. The good-

[4] This brief addresses the court of appeals' holding that the Transport Rule violated the good-neighbor provision's substantive limits. The court also held that the Transport Rule violated the CAA's "cooperative federalism" structure; that issue is addressed in the State and local governments' brief in opposition.

neighbor provision thus has both a State-specific focus—EPA must consider "amounts" from "within" each upwind State that "contribute"—and a focus on air quality—EPA may prohibit only those "amounts" that "contribute significantly to nonattainment" in a downwind State. EPA's assertion of broader authority to order whatever collective upwind reductions it deemed "reasonable" ignored those statutory limits.

Moreover, EPA challenges only a *subset* of the holdings below, leaving unchallenged key holdings that led to the Transport Rule's vacatur. For example, while EPA acknowledges that the court of appeals independently vacated the Transport Rule because EPA imposed emissions reductions greater than necessary for downwind States to attain NAAQS, EPA.Pet. 10, that issue is nowhere addressed in EPA's petition. Likewise, EPA does not mention, let alone dispute, the court's holding that EPA failed to account for downwind States' own contributions to nonattainment. Thus, even if EPA's petition were granted and this Court ruled in EPA's favor, the Transport Rule would remain vacated and would still need to be fundamentally revised.

EPA's own air-quality findings both confirm the flaws identified by the court of appeals and refute the notion that the Transport Rule is essential to public health. The Transport Rule mandated more stringent emissions controls than its predecessor, CAIR. But EPA's most recent actual air-quality data demonstrate that virtually all downwind areas in the eastern United States have attained the NAAQS under CAIR. Significant emissions reductions beyond CAIR are thus unnecessary to eliminate "significant contribution" to "nonattainment."

Indeed, the Transport Rule itself found that because of other independent factors (such as other fed-

eral requirements, industry efforts and State-mandated emissions reductions), many downwind areas addressed in the Transport Rule would attain NAAQS in 2014 *even in the absence* of *any* good-neighbor emissions controls. Thus, even if this Court upheld EPA's approach to defining upwind States' obligations without regard to each State's actual contribution to downwind nonattainment, the Transport Rule would still need to be substantially redone to account for EPA's own findings that the upwind emissions controls it adopted in 2011 will, in many instances, be unnecessary in 2014.

EPA's air-quality data also provide the complete answer to petitioners' unfounded suggestion that thousands of deaths and other massive public health consequences will occur unless the Transport Rule is reinstated. Petitioners rely on analyses comparing the Transport Rule's benefits to a hypothetical world with *no* good-neighbor emissions controls. *See* 76 FR at 48308-19. Those analyses are irrelevant to whether the decision below will adversely affect public health because the court of appeals directed EPA to continue administering CAIR until a replacement rule is adopted. And, as noted, there has been widespread attainment of NAAQS under CAIR—a level of ambient air quality that is by definition sufficient "to protect the public health." 42 U.S.C. §7409(b)(1).

I. EPA DOES NOT DISPUTE AN INDEPENDENT BASIS UPON WHICH THE COURT OF APPEALS VACATED THE TRANSPORT RULE.

1. EPA does not challenge an independent ground upon which the court of appeals vacated the Transport Rule. Rather, EPA challenges only a *subset* of the holdings below. *See* EPA.Pet. 10, 21-28; EPA.Pet.App. 31a-41a. The court correctly held that

the Transport Rule was flawed because EPA failed to "targe[t] those emissions from upwind States that 'contribute significantly *to nonattainment*.'" *Id.* 28a. EPA does not challenge that holding and it is not included in EPA's Questions Presented. Even apart from the merits of the legal issues, therefore, this case is a particularly inappropriate candidate for certiorari.

This holding was an "independent" basis for vacating the Transport Rule, *id.* 31a, and it is distinct from the court of appeals' additional holding that the Transport Rule unlawfully used cost to "redefine each State's 'significant contribution,'" *id.* 35a-36a. Section 110(a)(2)(D)(i)(I) authorizes EPA to require States to prohibit only those "amounts" of emissions that "contribute significantly *to nonattainment*" (emphasis added). EPA was thus separately obligated to ensure that its emissions controls did not "require upwind States to do more than necessary for the downwind States to achieve the NAAQS." EPA.Pet.App. 39a-40a. Where less costly emissions controls would have achieved downwind attainment—which was the case here, *see infra* pp. 11-12—EPA was required to "ratchet back the upwind States' obligations to the levels of reductions necessary and sufficient to produce attainment in the downwind States." EPA.Pet.App. 28a. This independent statutory limitation applies even if EPA were otherwise permitted to use its two-stage approach to define "cost-effective" "significant contribution."

2. EPA's decision not to challenge the court of appeals' "nonattainment" holding is understandable because that holding is correct. "The good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* Under

§110(a)(2)(D)(i)(I), EPA may require a State to prohibit only "amounts" of emissions that "contribute significantly *to nonattainment*" (emphasis added). Once a downwind location achieves attainment, EPA's authority to regulate upwind emissions ceases.

Indeed, EPA has previously recognized this independent limitation. In the NO_x SIP Call, EPA stressed it had ensured that its "cost-effective" emissions controls had not produced any "instance of 'overkill,' so that none of the upwind reductions required under [the NO_x SIP Call] is more than necessary to ameliorate downwind nonattainment." 63 FR at 57403; *see also id.* 57379, 57446-47. And in opposing certiorari in *Michigan*, EPA again stressed that it had not imposed emissions controls greater than necessary to eliminate downwind nonattainment. EPA *Michigan* Cert. Opp. 11.

As the NO_x SIP Call demonstrates, EPA can prevent this type of overcontrol even when it determines "significant contribution" based on "cost-effectiveness." But EPA in the Transport Rule refused even to consider its statutory obligation to do so.

As noted, EPA used uniform "cost per ton thresholds"—*i.e.*, emissions reductions that could be achieved at a certain cost per ton—to determine emissions reductions requirements. *See supra* pp. 3-4. EPA, however, refused to consider whether downwind States could attain NAAQS even if less stringent emissions limits were imposed on upwind States. For example, EPA conceded that it selected the uniform $500/ton threshold for NO_x without modeling whether downwind attainment could be achieved at lower costs. 76 FR at 48256. EPA also refused to consider the impact of SO_2 controls costing less than $500/ton, despite having gathered data on

such controls, *see* CAJA2192-93. Had EPA considered these data, it would have found, as commenters showed, that less costly controls would still have allowed downwind States to attain NAAQS—and thus EPA had *no statutory basis* for imposing more stringent emissions controls. *See* CAJA1066-68; CAJA1374.

3. Although ALA, unlike EPA, does challenge this aspect of the court of appeals' decision, it does not dispute the substance of the court's holding that EPA cannot mandate emissions reductions beyond those necessary to achieve downwind attainment, and it does not dispute the court's holding that EPA failed to consider whether less costly emissions controls would have allowed downwind States to attain NAAQS. Instead, ALA asserts that "challengers [did not] identif[y] any instance in which the Rule required greater reductions than necessary to achieve attainment." ALA.Pet. 23-24.

That is simply false. As shown above, commenters specifically demonstrated that less costly controls would still have enabled downwind States to attain the NAAQS, and EPA has never disputed that showing. Moreover, EPA's own findings further demonstrate that EPA significantly overcontrolled. For example, for the locations EPA projected to have problems attaining or maintaining the annual $PM_{2.5}$ NAAQS, the emissions controls imposed by the Transport Rule were projected to achieve air quality at each of those locations *superior to* the relevant NAAQS, in many instances by a substantial margin.[5]

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[5] *See* CAJA2964. The difference between the NAAQS and the average air-quality levels EPA imposed in the Transport Rule for these locations was more than *15 times* the level of "signifi-

EPA likewise imposed reductions far greater than necessary for downwind States to attain NAAQS for 24-hour $PM_{2.5}$ and ozone for the substantial *majority* of the relevant locations.[6] Any doubt on this score is further dispelled by the fact that widespread attainment of NAAQS by the downwind States has been achieved under CAIR even though CAIR allows for higher levels of emissions than the Transport Rule. *See infra* pp. 30-31.

Indeed, ALA appears to concede that in numerous instances the Transport Rule mandated emissions reductions that will produce downwind air quality substantially superior to NAAQS, but speculates that such overcontrol is necessary to ensure that all other downwind locations achieve NAAQS. ALA.Pet. 24.

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cant contribution" that triggered imposition of emissions controls. Industry/Labor DC Cir. Merits Br. 28 n.11.

[6] Industry/Labor Merits DC Cir. Br. 28-29 & nn.12-13 (citing EPA data). To the extent ALA suggests the record is unclear as to whether any specific State was overcontrolled, EPA's own data confirm that such overcontrol would occur under the Transport Rule. For example, Texas was "linked" solely to Madison, Illinois with respect to $PM_{2.5}$, *see* 76 FR at 48241 (tbl.V.D-2), 48243 (tbl.V.D-5), but Madison was projected to achieve air quality significantly superior to the relevant NAAQS, *see* CAJA2964-65. So too for South Carolina. *Compare* 76 FR at 48241 (tbl.V.D-2) (linking South Carolina to Fulton, Georgia for annual $PM_{2.5}$), *with* CAJA2964 (projecting post-Rule air quality for Fulton superior to NAAQS). Examples of overcontrol with respect to ozone-related emissions abound as well. *Compare, e.g.*, 76 FR at 48246 (tbl.V.D-9) (linking Iowa, Kansas, Oklahoma and Wisconsin to Allegan, Michigan), *with* CAJA2561 (projecting post-Rule air quality for Allegan superior to NAAQS). More broadly, the record demonstrated that downwind attainment could have been achieved with much less strict emissions controls, CAJA1066-68; CAJA1374, and, indeed, that *current* emissions levels have produced widespread attainment of NAAQS by downwind States, *see infra* pp. 31-32.

But EPA never made such a finding and, in fact, determined in the NO_x SIP Call that it could adjust upwind emissions obligations to avoid imposing obligations "more than necessary to ameliorate downwind nonattainment." 63 FR at 57403. Here, as explained, EPA simply refused even to examine the relevant data, *see supra* pp. 11-12, which directly contradict ALA's claim. In any event, that one upwind State may need to be "overcontrolled" in the sense posited by ALA to ensure that a downwind State achieves attainment is not grounds for overcontrolling other States.[7]

II. THE COURT OF APPEALS' CORRECT AND FACTBOUND DETERMINATION THAT THE "SIGNIFICANT CONTRIBUTION" ARGUMENT WAS RAISED BEFORE EPA DOES NOT WARRANT REVIEW, AND ITS HOLDING ON THE UNDERLYING MERITS OF THE ARGUMENT WAS CORRECT.

Petitioners' lead argument for certiorari is that the court of appeals "should not even have decided" what they call the "significant contribution" issue because, petitioners claim, it was not first presented to EPA. *See* EPA.Pet. 18-21; *see also* ALA.Pet. 16-20. This

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[7] Likewise, that some locations may not achieve attainment even after imposition of the Transport Rule's emissions budgets provides no justification for overcontrolling other upwind States that are not "significantly contributing" to those locations. *Cf.* ALA.Pet. 23. In any event, EPA found that the Transport Rule would "resolve all projected downwind nonattainment of the annual and 24-hour $PM_{2.5}$ NAAQS," except for a single area that "is significantly affected by local emissions from a sizable coke production facility and other nearby sources," 76 FR at 48259, and this single, unique instance of nonattainment says nothing about whether upwind States linked to other areas were overcontrolled.

"waiver" issue does not remotely warrant review. It presents only the context-specific application of settled precedent to a single issue that, given the multiple statutory violations found by the court of appeals, was not even dispositive. Moreover, petitioners' focus on waiver only underscore that certiorari is improper because, if petitioners were correct about waiver, the Court would not even reach the merits argument that petitioners contend justifies certiorari. *See* EPA.Pet. (I), 21-28; ALA.Pet. i, 28-30.

In all events, the court of appeals correctly held that the "significant contribution" argument was raised with sufficient "specificity" before EPA. EPA.Pet.App. 34a n.18. And neither EPA nor the dissent below has seriously disputed the *merits* of the court of appeals' holding that the Transport Rule was "flawed" because it imposed emissions reductions that were "not based on the 'amounts' from upwind States that 'contribute significantly to nonattainment.'" *Id.* 31a.

1. Petitioners make no serious effort to claim that the court of appeals' "waiver" holding itself presents an issue of exceptional importance justifying certiorari. Nor could they, as this holding does not even raise a legal issue.

Indeed, there was common ground below on the applicable legal principles. Both the majority and dissent agreed that §307(d)(7)(B) of the CAA, 42 U.S.C. §7607(d)(7)(B), supplied the standard for exhaustion. *Compare* EPA.Pet.App. 32a n.18, *with id.* 65a, 96a. Both the majority and dissent therefore considered whether "objections" were raised with "reasonable specificity" in the Transport Rule proceeding. *Compare id.* 34a n.18, *with id.* 96a. They likewise both recognized that §307(d)(7)(B) does not limit parties to the precise formulations made before the agency, but

rather permits "leeway" to expand and elaborate on review. *Compare id.* 34a n.18, *with id.* 109a-10a.

Thus, the only issue is the court of appeals' application of these agreed-upon principles to the specific record in this case. Certiorari to review such a factbound question is clearly unwarranted. *See, e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

That is particularly so here given EPA's and ALA's treatment of the waiver issue below. EPA's brief below did not even *mention* "waiver" in its jurisdictional statement, statement of issues, or summary of argument. *See* EPA DC Cir. Merits Br. 1-3, 12-17. And in the body of its brief, EPA only suggested in the most glancing and tentative fashion (amid sections addressed to the merits) that the claim *may* have been waived. *See id.* 30 (merely complaining that commenters did not articulate their views "'forcefully'" and stating that "[w]hether their failure to do so formally rises to the level of waiver, it at the very least bolsters the reasonableness of EPA's adoption of its proposed approach"). Elsewhere, EPA tersely asserted—in a single sentence—that petitioners' "significant contribution" argument "likely has been waived." *Id.* 32. Nowhere did EPA contend that this argument was actually waived, let alone provide the argument and case citations it now advances. For its part, ALA did not mention waiver of the issue below at all.

2. Nor do petitioners identify any error in the court of appeals' application of settled law to the facts of this case. EPA wrongly suggests that the court held §307(d)(7) was satisfied solely by comments made in the predecessor CAIR rulemaking. EPA.Pet. 20. As EPA conceded below, and ALA concedes now, *commenters in the Transport Rule proceeding did raise objections to EPA's "significant contribution" ap-*

proach. EPA DC Cir. Merits Br. 30 & n.16, 32 & n.18; ALA.Pet. 18 n.2. The court of appeals considered comments made in the prior CAIR proceeding—along with *North Carolina*'s reasons for invalidating CAIR—as relevant *context* for assessing whether the arguments made in the Transport Rule proceeding were "reasonabl[y] specifi[c]." *See* 42 U.S.C. §7607(d)(7)(B); EPA.Pet.App. 34a n.18 ("In light of the indications that EPA was aware of their objection but had no intention to revisit its approach ... the specificity of the commenters such as Wisconsin and Tennessee was 'reasonable' under the circumstances."). The court's conclusion that the Transport Rule comments were sufficiently specific was correct and in any event does not warrant further review.

In particular, the court of appeals evaluated the Transport Rule comments objecting to EPA's "significant contribution" approach in light of the fact that EPA "considered—and rejected—precisely this same argument in CAIR." EPA.Pet.App. 32a n.18. CAIR commenters argued "that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." 70 FR at 25176-77. In issuing CAIR, EPA acknowledged this argument but rejected it. *Id.* 25177; *see also* EPA Reh'g Pet. 11 (acknowledging CAIR rejected commenters' objection to EPA's "significant contribution" methodology "for legal and policy reasons").

EPA had another opportunity—and, indeed, an obligation—to revisit this issue after *North Carolina*. As noted, *North Carolina* held that once EPA defines each State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at

921; *see also id.* 918 ("EPA can't just pick a cost for a region, and deem 'significant' any emissions that sources can eliminate more cheaply."). *North Carolina* found that CAIR was "fundamentally flawed" because it failed to make "state-specific quantitative contribution determinations or emissions requirements," and instructed "EPA [to] redo its analysis *from the ground up*." *Id.* 929 (emphasis added).[8]

In the remand proceeding that led to adoption of the Transport Rule, commenters urged EPA to adopt regulatory approaches consistent with *North Carolina*. 75 FR at 45299; CAJA2308-12. Among the alternatives put before EPA was one that reflected the "essential principles" of the statutory construction ultimately adopted by the court of appeals. EPA.Pet.App. 40a n.24. But EPA refused to reconsider its fundamental position on significant contribution and rejected these alternative approaches. 75 FR at 45299; CAJA2308-12. And notwithstanding EPA's statements that it would not revisit this issue,

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[8] EPA's suggestion that *North Carolina* did not "disturb the agency's basic two-step analytical approach" is incorrect. EPA Pet. 10; *see also id.* 21. The portion of *North Carolina* EPA cites observed merely that petitioners in that case had not challenged EPA's "two-step analytical approach" and that the court was thus not directly addressing it. *See* 531 F.3d at 916-17. But, as the court of appeals correctly concluded below, *North Carolina*'s findings that CAIR's distribution of NO_x reduction obligations was unlawful because it could "force an upwind State to 'exceed the mark,'" EPA.Pet.App. 35a (quoting *North Carolina*, 531 F.3d at 921), clearly called into question EPA's use of the second stage here to require States to reduce emissions to levels below the "insignificance" threshold or beyond those necessary for the downwind State to achieve NAAQS. The same "statutory authority" applied in both instances. *Id.* 35a n.19. In *North Carolina*, as here, EPA could require States only to "prohibit those 'amounts which will ... contribute significantly to nonattainment." *Id.*

several parties still filed additional comments in the Transport Rule proceeding urging EPA to abandon its approach of setting emissions budgets solely based on cost and without considering the impact on downwind "contribution." CAJA556, 1293, 1756.

ALA acknowledges that commenters did, in fact, raise the "significant contribution" issue in the Transport Rule proceeding, but ALA tries to minimize the importance of these comments by mischaracterizing them. Wisconsin did not advocate "more stringent regulation." ALA.Pet. 18 n.2 (emphasis omitted). Wisconsin's proposed approach would have produced *less* stringent budgets in situations where the agency had required a State to eliminate more than its significant contribution. CAJA1293. And Tennessee contended that EPA should *not* apply its uniform cost controls when doing so would "reduce [a State's] contribution below [the] 1% significance [threshold]." CAJA556.

ALA also acknowledges that, at the outset of the Transport Rule proceeding, parties argued against the approach ultimately adopted by EPA and in favor of alternative approaches more consistent with *North Carolina*. ALA, however, says these objections are irrelevant because they merely challenged the agency's policy as arbitrary. ALA.Pet. 18. But the court of appeals found EPA's approach was arbitrary too. EPA.Pet.App. 36a, 37a n.22; *see infra* p. 21. More fundamentally, as shown above, the agency in fact received, considered, and rejected statutory as well as policy arguments and the issue was clearly raised and not waived.

3. Finally, EPA does not seriously dispute the merits of the court of appeals' holding that under the good-neighbor provision the agency cannot require an upwind State to make reductions greater than its

own "significant contribution." EPA also acknowledges, EPA.Pet. 28, that it will ultimately need to confront this statutory requirement as it continues to regulate upwind emissions—including in the remand that will be necessary for EPA to ensure it is not imposing emissions reductions beyond those necessary for downwind locations to attain NAAQS and to account for EPA's own projections of substantially improved air quality in 2014 even absent good-neighbor emissions controls. Certiorari in such circumstances is clearly unwarranted.

As noted, EPA used a two-stage approach to define significant contributions. In the first stage, EPA defined "amounts" of downwind pollution that were deemed to be, by definition, insignificant. 76 FR at 48236 ("states whose contributions are below these thresholds do *not significantly contribute* to nonattainment") (emphasis added); *see also id.* 48237. But in the second stage, EPA ignored those "insignificance" thresholds and instead set emissions budgets based on "cost-effectiveness," with the result that a State "may be required to reduce its emissions by an amount greater than the 'significant contribution' that brought it into the program in the first place." EPA.Pet.App. 34a-35a.

The court of appeals found this aspect of EPA's approach unlawful for two reasons. First, the court found that EPA's approach violated the plain language of §110(a)(2)(D)(i)(I) because the reductions EPA imposed were not based on "the 'amounts' from upwind States that 'contribute significantly to nonattainment' in downwind States." *Id.* 31a. EPA cannot "redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be more than its own significant contribution to a downwind State." *Id.* 36a (emphasis omit-

ted). The "statute requires a State to prohibit at *most* those 'amounts' which will 'contribute significantly'—and no more." *Id.* 37a (emphasis added).

Second, the D.C. Circuit found EPA's approach arbitrary because it was internally inconsistent. *Id.* 36a, 37a n.22. EPA found at stage one that "'states whose contributions are below th[e] thresholds do not significantly contribute to nonattainment,'" *id.* 36a (quoting 76 FR at 48236), but then adopted a definition of "significant contribution" that disregarded that finding and that could arbitrarily require a State to reduce emissions below those "insignificance" thresholds, *id.*

Neither EPA nor ALA presents this issue fairly, because each studiously avoids quoting the operative language from EPA's rule on which the court of appeals relied. One would never know by reading the petitions that EPA found that States whose emissions fall below the stage-one threshold "*do not significantly contribute to nonattainment.*" Instead, petitioners invent a new nomenclature that never appeared in the Transport Rule, calling stage one "the Screening Analysis" and stage two "the Control Analysis." EPA.Pet. 6-7. But whatever their terminology, petitioners do not and cannot dispute that EPA expressly found that certain amounts were insignificant and then ignored that statutory boundary in determining the amount of reductions to order.

Petitioners offer no objection to the court of appeals' actual reasoning. Nor did the dissent below dispute the majority's analysis on the merits. EPA.Pet.App. 111a-14a. That is because there is no possible justification for a methodology that defines an "insignificant contribution" threshold as a basis for determining whether to regulate, but then ignores the very

same definition when imposing specific regulatory requirements.

To the limited extent that EPA now defends the Transport Rule as actually written, EPA's arguments highlight that the Transport Rule's approach is untethered from statutory text. EPA asserts it is "reasonable" to "determine the 'significan[ce]' of particular state contributions by reference to [cost-effectiveness] and without regard to the amount of each State's downwind contribution." EPA.Pet. 21 (first alteration in original).[9] As the court of appeals correctly held, however, the "statute requires a State to prohibit at most those 'amounts' which will 'contribute significantly'—and no more." EPA.Pet.App. 37a. By contrast, as EPA conceded below, the Transport Rule's approach would permit EPA to "require a State to reduce *more than the State's total emissions that go out of State*." *Id.* 38a n.23 (emphasis added).

Finally, EPA suggests that the concern that it required States to reduce emissions beyond the "significance" threshold is "hypothetical." EPA.Pet. 28. Notably, EPA does not and cannot claim that it did not mandate such overcontrol, because EPA never determined the "amounts" upwind States were "contributing" after it imposed emissions budgets. EPA.Pet.App. 15a-17a; *see also* EPA DC Cir. Merits Br. 33 n.20 ("this was not an issue EPA analyzed in a direct fashion for the Rule"). As the D.C. Circuit observed in *North Carolina*, "[w]hen a petitioner com-

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[9] EPA incorrectly suggests that *Michigan* approved the Transport Rule's approach to "significant contribution." *See* EPA.Pet. 24-25. This issue "was not presented in *Michigan*," EPA.Pet.App. 36a n.20, and, as explained *infra*, the Transport Rule's use of "cost" differed from that approved in *Michigan*.

plains EPA is requiring a state to eliminate more than its significant contribution, it is inadequate for EPA to respond that it never measured individual states' significant contributions." 531 F.3d at 920.[10] EPA seeks to excuse this failure by asserting that no party raised any concern about whether its regulatory approach could force a State to eliminate "insignificant" contributions. EPA.Pet. 28. But as explained above, commenters not only objected to EPAs approach, but also—specifically referencing the 1% insignificance threshold—asked EPA to provide State-specific contribution data showing what levels of emissions reductions were necessary to eliminate "significant contribution" "without considering costs." Comments of West Virginia Department of Environmental Protection 3 (Sept. 30, 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-2981. EPA's response was to completely ignore the issue.

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[10] Although EPA asserts "[t]he court cited no basis in the record for believing" there was a "realistic possibility" States could be forced to reduce emissions below the "insignificance" threshold, EPA.Pet. 28, the record indicates the opposite. In several instances, the Transport Rule required States that were contributing only slightly above the "insignificance" threshold to make substantial emissions reductions. *See, e.g.*, 76 FR at 48240 (tbl.V.D-1) (regulating Texas notwithstanding a "contribution" of only 0.03 $\mu g/m^3$ to nonattainment above the "insignificance" threshold); *id.* 48245 (tbl.V.D-7) (regulating South Carolina notwithstanding a "contribution" of only 0.1 ppb above the "insignificance" threshold); *id.* 48261-63 (imposing emissions budgets).

III. PETITIONERS ALSO FAIL TO DEMONSTRATE ANY ERROR WITH REGARD TO THE COURT OF APPEALS' INDEPENDENT "PROPORTIONALITY" HOLDING.

1. The only aspect of the court of appeals' decision seriously disputed by EPA on the merits is what EPA calls the "proportionality" holding. EPA.Pet. 22-28. But even here, EPA's challenge is incomplete. As noted, the court of appeals rendered two related, yet distinct, holdings on this point. It held that EPA violated the good-neighbor provision because EPA "made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." EPA.Pet.App. 39a. It also separately held that EPA "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." *Id.* EPA does not even mention the latter holding.

2. Even as to the aspect of the "proportionality" holding EPA does challenge, it fails to demonstrate any error.[11] That holding corrected EPA's attempts to "'force an upwind state to share the burden of reducing other upwind states' emissions.'" EPA.Pet.App. 38a (quoting *North Carolina*, 531 F.3d at 921).

As noted, in determining the amount of reductions to require, EPA defined these "amounts" based on the collective "cost-effectiveness" of pollution controls on all emissions in the upwind State. 76 FR at 48248-

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[11] EPA is wrong in suggesting (EPA.Pet. 19-20) this issue was not raised in the court of appeals. *See* Industry/Labor DC Cir. Merits Br. 22, 33. ALA is wrong in claiming (ALA.Pet. 20, 25) it was not raised to EPA. *See* 75 FR at 45299; CAJA2311-12.

52, 48255, 48258-59. Under EPA's interpretation, the cost of emissions reductions determined what portion of an upwind State's emissions would be prohibited. *Id.*

This is inconsistent with—indeed, completely disconnected from—the text of §110(a)(2)(D)(i)(I), which requires EPA to consider each "individual upwind State's actual contribution to downwind air quality." EPA.Pet.App. 23a. Under EPA's "cost-effectiveness" approach, however, emissions-reduction obligations were "not tied to how much the upwind State contributed to downwind States' air pollution problems." *Id.* 16a.

As a result, under EPA's approach, a State could be subjected to a *heightened* emissions-reduction obligation simply because it can reduce emissions more cheaply than another State contributing equal amounts to the same location. *See* EPA.Pet. 27-28. A "definition" of "significant contribution" that has that consequence cannot be squared with the plain text of §110(a)(2)(D)(i)(I). There is no statutory basis for setting States' emissions budgets at levels more stringent than justified by the "amounts" that States are individually "contributing."

EPA's approach also impermissibly ignores the statute's focus on each State's *individual* contribution to nonattainment. As noted, EPA determined upwind States' emissions-reductions obligations based on whether those reductions are *collectively* cost-effective. *See also* EPA DC Cir. Merits Br. 29 (noting EPA determined emissions reductions on upwind States "collectively"). But nothing in the CAA permits EPA to increase emissions-reduction obligations on one upwind State merely because that State can reduce more cheaply than another upwind State. To the contrary, the good-neighbor provision directs EPA

to consider the "amounts" from "*within*" each upwind State that "contribute significantly" to downwind nonattainment.

In contrast to EPA's approach, the court of appeals' "proportionality" reading faithfully applies the statute's text and purpose. That interpretation is the only one that ensures consistency in determining the "air pollutant ... amounts" that "contribute significantly to nonattainment" and prevents a State from being required to eliminate "more than its own 'amounts which will ... contribute significantly'" to downwind nonattainment. EPA.Pet.App. 38a; *see id.* (EPA has "'no authority to force an upwind state to share the burden of reducing other upwind states' emissions'"). It ensures that when States "contribute" equal "air pollutant ... amounts" to a downwind location, they are treated equally. *Cf.* EPA.Pet. 27. And it ensures that EPA cannot find an "air pollutant ... amount" in one State to constitute a "significant contribution" to nonattainment simply because EPA deems the costs of eliminating it in that State to be minor, while it simultaneously finds a much greater "amount" in another State to be insignificant.

In this regard, and contrary to EPA's claims, EPA.Pet. 21, 24, the Transport Rule did not use cost considerations in the way previously approved by the D.C. Circuit in *Michigan*. There, EPA had relied on cost considerations to "reduce" the emissions reductions required by regulated upwind States. 213 F.3d at 675. The *Michigan* court recognized that EPA had "first determined that 23 jurisdictions [were] 'significant' contributors" based on each State's contribution, but held EPA could thereafter consider costs to "terminat[e]" only a "subset of each state's contribution." *Id.* It based that holding on the interpretive principle that Congress intends for agencies "to con-

sider the costs of demanding *higher* levels of environmental benefit" and to reduce the level of control required when costs are disproportionate to benefits. *Id.* 679 (emphasis added).

By contrast, as the court of appeals found, the Transport Rule used cost in a different manner. EPA.Pet.App. 38a. Rather than seeking "to prevent exorbitant costs from being imposed on certain upwind States" and *reducing* the amount of contribution above the insignificance threshold that a State must eliminate, as *Michigan* approved, *id.* 27a, the Transport Rule misused cost to define and increase States' emissions-reduction obligations. EPA used "cost-effectiveness" without regard to its own insignificance threshold and without regard to whether the emissions reductions it imposed were needed to address nonattainment. Indeed, EPA's misuse of costs would allow it to "require a State to reduce *more than the State's total emissions that go out of State.*" *Id.* 38a n.23. The court correctly concluded that neither §110(a)(2)(D)(i)(I) nor *Michigan* countenanced that entirely different use of costs. *Id.* 25a.

3. EPA offers no statutory argument to the contrary, but instead tries to justify its approach on two policy grounds. *First*, EPA says its "cost effectiveness approach provides a rough but objective means of equitably distributing pollution-control burdens among" upwind States. EPA.Pet. 28. In particular, EPA poses a hypothetical in which three upwind States contribute equal amounts to a downwind State's nonattainment but have made differing levels of investment in pollution controls. *Id.* 27-28. EPA says that under the court of appeals' approach, all three would be required to make equivalent emissions reductions. *Id.* 27. EPA contends that the Transport Rule's reliance on "cost-thresholds" properly reduces the obliga-

tion of States that have already mandated substantial emissions controls by imposing greater reductions on States that have not made such investments on the ground that they can reduce emissions more cheaply. *Id.* 27-28; *see also* ALA.Pet. 27.

Again, EPA's arguments only highlight the Transport Rule's failure to "adhere to th[e] basic requirement of the statutory text." EPA.Pet.App. 37a-38a. As noted, §110(a)(2)(D)(i)(I) permits EPA to require an upwind State to "prohibit" only the "amount" of "air pollutants" emitted by sources "within the State" that travel to downwind locations and "contribute significantly to nonattainment." From the perspective of the good-neighbor provision, not to mention the downwind State, the three upwind States in EPA's hypothetical all "contribute equal amounts to downwind nonattainment." EPA.Pet. 27. The court of appeals' decision thus furthers the congressional purpose embodied in the statutory text.

In contrast, EPA never explains why it would be "inequitable" to treat the same amount of "contribution" by two States equally merely because one State had previously mandated investments to reduce its amount to the *same* level as a neighboring State. For example, the neighboring State may have achieved lower "amounts" of emissions by mandating greater use of clean energy or undertaking policies that minimized energy consumption, or its economy may simply have a different industrial base—none of which makes it necessarily more equitable, much less lawful, for it to be required to bear a portion of the first State's statutory burden.

Second, EPA says that the court of appeals' textual reading of §110(a)(2)(D)(i)(I) is "unrealisti[c]" and suggests this standard would be difficult for the agency to implement. EPA.Pet. 22; *see also* ALA.Pet.

26. But EPA stops short of saying it would be impossible for the agency to comply and ultimately acknowledges that the decision below leaves it "enough latitude" to "craft a new regulatory approach that meets the court's requirements." EPA.Pet. 30.

Nor could it maintain otherwise. The "difficulty" identified by EPA is that it may not be possible to undertake precisely "proportional" reductions when multiple upwind States contribute to multiple downwind locations. In those instances, EPA asserts that it is "likely" there would be "some degree of incidental 'overcontrol' as well as a lack of 'proportionality.'" *Id.* 23. But as EPA admits, the court of appeals fully understood that there are "multiple, overlapping linkages involved in the interstate pollution problem," *id.* 30 and the court's ruling accounted for this fact, EPA.Pet.App. 29a. The court held that EPA had "discretion" to account for these complexities and that the agency was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not ... possible" to do so. *Id.* The court thus required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a-29a. The flaw in the Transport Rule is that EPA did not even attempt to limit its overcontrol to those circumstances.

Thus, EPA's argument ultimately devolves to *ipse dixit* assertions that it will "likely be more costly and burdensome" to comply with the court of appeals' "proportionality" holding. EPA.Pet. 30. Given the complex nature of the analysis already undertaken in the Transport Rule, any incremental "burden" that adhering to the statute's text might impose neither calls into question the correctness of the court of appeals' holding nor provides a compelling justification for certiorari. This is particularly true in light of the

separate errors in the Transport Rule that EPA does not contest here and that will require extensive revisions of the Rule.

IV. EPA'S OWN FINDINGS PRECLUDE READOPTION OF THE TRANSPORT RULE.

As noted, EPA justified its emissions controls based on future air-quality predictions made in 2011 in the Transport Rule using 2005 base-year data. EPA now seeks to have the Transport Rule become effective for the first time. The resulting air-quality improvements that have, in fact, occurred since 2005 under CAIR provide vivid confirmation of the Transport Rule's fundamental errors. Further, imposing the Transport Rule's emissions controls now would be inconsistent with the Rule's own air-quality predictions and EPA's justifications for emissions controls in the first instance.

1. In the Transport Rule, EPA relied on modeling to predict future air quality under two scenarios: (i) without any good-neighbor emissions controls (*i.e.*, no CAIR) and (ii) with the controls mandated under the Transport Rule. 76 FR at 48228-36, 48253-59; CAJA2546-637. Notwithstanding generally improving air quality under CAIR, EPA determined that steeper emissions reductions beyond CAIR were needed to achieve the air-quality levels desired by EPA. 76 FR 70091, 70099 (Nov. 10, 2011) (the Transport Rule "mandates even greater reductions than have already occurred under CAIR"); *see also* 75 FR at 45217; 76 FR at 48214.

Yet EPA's own recent air-quality data demonstrate that this fundamental predicate for the Transport Rule was incorrect. First, EPA has recently reported that virtually all "downwind" locations in the eastern United States attained the NAAQS for ozone and

$PM_{2.5}$ by 2011. *E.g., 2011 Progress Report* 12 ("Improvements in these 90 areas means that over 98 percent of the original nonattainment areas in the East now have ozone air quality that is better than the [NAAQS]."); *id.* 14 ("Improvements in these 35 areas mean that 97 percent of the areas originally designated nonattainment in the East now have $PM_{2.5}$ air quality that is better than the standard under which they were originally designated nonattainment."). EPA found that CAIR-related reductions were a "significant contributor to these improvements." *Id.* 12, 14.

Second, EPA's recent "design value" data also show that air quality continues to improve under CAIR at the locations specifically at issue in the Transport Rule.[12] With regard to the "nonattainment" and "maintenance" locations that were the focus of the Transport Rule, over 92% of the 65 locations with current data values meet the NAAQS under CAIR without the Transport Rule emissions controls. *Id.*[13]

2. In light of EPA's future air-quality predictions in the Transport Rule itself, the Rule cannot be readopted now even if EPA's approach to establishing emissions reductions were affirmed by this Court. As noted, the Transport Rule made projections of 2012 air quality on the counterfactual assumption that

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[12] *Compare* EPA's 2009-2011 Design Values for $PM_{2.5}$ ("PM2.5 Detailed Information" at tbl.6) and Ozone ("Ozone Detailed Information" at tbl.6), *available at* http://www.epa.gov/airtrends/values.html (access bottom table tab), *with* 76 FR at 48240-46 (tbls.V.D-2, V.D-3, V.D-5, V.D-8, and V.D-9) (listing downwind location "linkages" used for the Transport Rule).

[13] On remand, EPA will also presumably have to consider subsequent changes to the NAAQS since the Transport Rule was promulgated. *See, e.g.*, 78 FR 3086 (Jan. 15, 2013) (revising annual $PM_{2.5}$ NAAQS).

CAIR was not in place. EPA used those projections to identify the "nonattainment" and "maintenance" locations that needed to be protected with upwind emissions controls. *See supra* pp. 2-3. No upwind emissions regulation was imposed for 2012 with respect to locations that were projected to attain NAAQS without good-neighbor emissions controls. 76 FR at 48233-36, 48239-46.

But EPA also made projections of future air quality for 2014. *Id.* 48211; CAJA2546-637. And those projections showed that many of the locations EPA believed would have air-quality problems in 2012 would attain NAAQS in 2014 *even absent* any good-neighbor emissions reductions (typically because of other federal requirements, independent State regulation, and other undertakings by industry sources to improve air quality).[14] Thus, under the Transport Rule's own analysis and findings, there is no justification for upwind emissions controls for the many downwind locations now expected to attain NAAQS without such controls.

V. THE TRANSPORT RULE IS NOT NECESSARY TO ENSURE THAT DOWNWIND STATES ATTAIN AND MAINTAIN NAAQS.

Finally, EPA contends that certiorari is necessary because "[t]he court of appeals' decision will substantially delay emissions reductions by upwind States that are necessary for downwind States to attain and maintain NAAQS." EPA.Pet. 29. Every aspect of this argument is incorrect.

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[14] Industry/Labor DC Cir. Merits Br. 45 & n.28 (citing EPA data). This is true with regard to each of the three NAAQS considered by EPA (annual and 24-hour $PM_{2.5}$ and ozone). *Id.*

First, as explained above, in striking down the Transport Rule, the court of appeals ordered EPA to continue administering CAIR. CAIR, of course, is the transport rule that EPA initially wanted to adopt, and it imposes significant emissions limitations on upwind States. *See generally* 70 FR at 25162-405. Consistent with EPA's predictions, downwind air quality has substantially improved under CAIR. *See supra* pp. 30-31. Indeed, EPA has recently found that there has been widespread attainment of NAAQS by downwind States in the eastern United States. *2011 Progress Report* 12-14.

In that regard, petitioners' claims that the Transport Rule would save thousands of lives and produce billions of dollars of social benefits, EPA.Pet. 31; ALA.Pet. 11-12, 34, is based on a misleading and irrelevant comparison. When EPA calculated the projected health benefits of the Transport Rule, it compared emissions under the Transport Rule with projected emissions if *no* good-neighbor restrictions (including CAIR) were in place. *See* 76 FR at 48308-19; *see also id.* 48229 (EPA did not "consider reductions associated with CAIR in the analytical baseline emissions scenario"). EPA has provided no analysis comparing the health benefits expected from the Transport Rule to those expected from CAIR, which has been in effect and will remain so until a valid replacement rule is adopted. And because there has been widespread attainment of NAAQS under CAIR, the rule has achieved ambient air quality that is sufficient "to protect the public health" with "an adequate margin of safety." 42 U.S.C. §7409(b)(1).

Second, even if this Court granted certiorari and ruled in EPA's favor on the issues raised in EPA's petition, EPA would still need to undertake a substantial rulemaking to revise the Transport Rule. *Cf.*

EPA.Pet. 29. As explained above, EPA has not challenged two of the fundamental errors with the Transport Rule identified by the court of appeals. *See supra* pp. 9-10, 24. These undisputed errors must be corrected before a lawful cross-state air pollution rule can be imposed. The Transport Rule must also be revised to reflect the predictions in the Rule itself of air-quality improvements that would be achieved independent of the Rule. *See supra* pp. 31-32. The "delay" about which EPA expresses concern will thus occur in any event, and will likely be longer if these issues must be reviewed by the Court before the new rulemaking can even commence.

Finally, the court of appeals did not rule on several legal arguments raised below that would independently require vacatur of the Transport Rule. *See, e.g.*, Industry/Labor DC Cir. Merits Br. 37-47; States DC Cir. Merits Br. 42-55. Because the court stayed the Transport Rule, these objections would need to be resolved before the Rule could be reinstated, and EPA offers no basis for assuming the court would rule in the agency's favor on these issues.

CONCLUSION

The petitions for certiorari should be denied.

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May 29, 2013

OPPOSITION BRIEF

RECORD
AND
BRIEFS

Nos. 12-1182 & 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS
and
AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Clean Air Act ("CAA") effects a system of cooperative federalism under which the Environmental Protection Agency ("EPA") defines the air-quality obligations that the States must meet, and the States then have a chance to meet those obligations in the manner they see fit. *See Train v. NRDC*, 421 U.S. 60, 78-87 (1975). Consistent with that framework, the court of appeals held that EPA could not define the amounts of pollution that "contribute significantly," 42 U.S.C. § 7410(a)(2)(D)(i)(I), to air-quality problems in downwind States and, at the same time, find that upwind States had failed to abate those newly defined contributions. The court of appeals also concluded that the upwind States aggrieved by the rule implementing that unprecedented approach could not have raised their challenge before the rule was promulgated.

The questions addressed in this brief are:

1. Whether the court of appeals lacked jurisdiction over the federalism challenge because it was not presented until after EPA promulgated the rule that simultaneously defined the States' obligations and dictated how they must be met.

2. Whether the court of appeals erred in holding that EPA must give States included in a section-7410(a)(2)(D)(i)(I) regional program a chance to devise their own plans to satisfy EPA's requirements before EPA imposes federal plans of its own design.

The industry and labor respondents' opposition addresses the remaining questions presented.

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INTRODUCTION

The CAA's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), is EPA's primary tool for regulating air pollution that crosses state lines. Although the petitioners assert that the enactment of that provision in 1990 strengthened the agency's ability to ensure compliance with national ambient air quality standards ("NAAQS") in downwind States, *see* EPA Pet. 3-4, they do not claim that any statutory amendment licensed EPA to override the Act's structure of cooperative federalism. That core feature of the Act has remained a constant throughout all of the legislative changes that the petitioners note. *See* Pet. App. 43a n.26. As the court of appeals correctly held, the Act continues to give States the first opportunity to satisfy the emissions-reduction obligations that EPA mandates. *Id.* at 4a, 42a-61a; *see Train*, 421 U.S. at 78-87.

The rule at issue here, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (the "Transport Rule"), is not EPA's first attempt to implement the current version of section 7410(a)(2)(D)(i)(I). EPA previously promulgated two rules under that provision, each of which acknowledged the Act's system of cooperative federalism and appropriately gave upwind States designated for inclusion in a multi-state regional program a reasonable chance to meet the new requirements that EPA announced. *See* Pet. App. 55a-57a. But the Transport Rule departed from that approach. It simultaneously announced new requirements for the upwind States and mandated how those requirements must be met, cutting the

States included in EPA's new Transport Rule region out of the implementation process entirely. *See id.* at 42a-54a.

The States do not question EPA's ultimate goal of improving downwind air quality. But to achieve that goal, EPA must work within the parameters that Congress has set. Although the petitioners claim that the Transport Rule did so, their description of the rule contains several important omissions, their legal argument ignores key statutory language and this Court's confirmation of the Act's core structure, and their claims about the health-related impact of denying the petitions incorrectly assume that the Transport Rule's vacatur left interstate transport of air pollution unregulated. For these and the additional reasons that follow, further review is unwarranted.

STATEMENT

1. a. Under the CAA, the prevention of air pollution has always been "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3). As the Court explained in 1975, "[t]he Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)]." *Train*, 421 U.S. at 79. The same is true today: EPA sets air-quality requirements, but the States are given the first opportunity to determine how best to meet those requirements through state implementation plans ("SIPs"). *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA's promulgation of a NAAQS and its subsequent designation of areas as "nonattainment," "attainment," or "unclassifiable." *Id.* §§ 7407(c)–(d), 7409. Those designations inform the types of provisions that SIPs must contain. *See, e.g.*, *id.* § 7502(c) (describing plan provisions required for States with "nonattainment" areas). States then have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (2)(A). After a SIP is submitted, EPA reviews it for technical completeness and compliance with the Act's requirements. *Id.* § 7410(k)(1)-(4).

If a SIP "as a whole . . . meets all of the applicable requirements of [the CAA]," EPA "shall approve" it. *Id.* § 7410(k)(3). If EPA concludes that a SIP it previously approved is "substantially inadequate to attain or maintain the relevant [NAAQS]" or otherwise fails to "comply with any requirement of [the CAA]," EPA "shall require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (the "SIP call" provision).

EPA may promulgate a federal implementation plan ("FIP") only if a State fails to submit an approvable SIP—that is, only if a State "has failed to make a required submission" or EPA disapproves such a submission, and the State fails to correct the deficiency before a FIP issues. *Id.* § 7410(c)(1). By definition, a FIP may not impose requirements that a State has not yet had a chance to meet. *See id.*

§ 7602(y) (defining a FIP as a plan "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]").

b. The Transport Rule attempted to implement 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires SIPs to

> contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

The statute does not define "contribute significantly" or "interfere" either generally or with respect to specific NAAQS. And although relatively simple atmospheric-dispersion modeling can relate local emissions of sulfur dioxide ("SO_2") and nitrogen oxides ("NO_x") to local ground-level concentrations of those pollutants, relating those emissions to the formation of fine particulate matter ("$PM_{2.5}$") and ozone—the two pollutants at issue here—is much more complex.

As the petitioners note, SO_2 and NO_x emissions can be transported great distances, transforming into particles that contribute to $PM_{2.5}$ concentrations hundreds of miles downwind. Similarly, NO_x emitted in an upwind State can interact with

sunlight and volatile organic compounds to form ozone that is transported to downwind States. *See* EPA Pet. 7-8 n.5 (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

As explained below, EPA has attempted to develop a framework through legislative rulemaking to address, under the current version of section 7410(a)(2)(D)(i)(I), SO_2 and NO_x emissions in light of their impact on $PM_{2.5}$ and ozone concentrations in downwind States. The outcome of those rulemaking proceedings, which identified the States included in EPA's latest multi-state region and their interdependent emissions-reduction obligations, remained unknown until each final rule was promulgated.

2. a. The first rule that EPA promulgated under the current version of the statute was the 1998 NO_x SIP Call, which applied to a group of 23 States that, according to EPA's analysis, contributed significantly to downwind nonattainment of EPA's one-hour and eight-hour ozone NAAQS. 63 Fed. Reg. 57,356, 57,356, 57,358 (Oct. 27, 1998). As its name suggests, the NO_x SIP Call was not promulgated as a series of FIPs. It was a SIP call that gave the States identified in that rulemaking proceeding 12 months to submit SIPs specifying the particular mix of controls appropriate to abate the significant contributions that EPA had defined. *Id.* at 57,362, 57,367, 57,369-70, 57,451; *see* 42 U.S.C. § 7410(k)(5) (authorizing EPA to establish reasonable deadlines,

not to exceed 18 months after notice is given, for SIP revisions).

Citing *Train*, EPA explained in the NO_x SIP Call that "[d]etermining the overall level of air pollutants allowed to be emitted in a State [under section 7410(a)(2)(D)(i)(I)] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility." 63 Fed. Reg. at 57,369.

On judicial review, the D.C. Circuit vacated the NO_x SIP Call in part based on EPA's failure to give adequate notice of some elements of the rule. *Michigan v. EPA*, 213 F.3d 663, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 903, 904 (2001). But after confirming that the CAA gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs, the court held that the NO_x SIP Call, which "merely provide[d] the levels to be achieved by state-determined compliance mechanisms," was in keeping with EPA's statutory role. *Id.* at 671, 687. The court explained that EPA had given States "real choice" regarding how to comply with EPA's requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687-88.

b. EPA's next regional section-7410(a)(2)(D)(i)(I) rule was the 2005 Clean Air Interstate Rule ("CAIR"). 70 Fed. Reg. 25,162 (May 12, 2005). CAIR covered 28 upwind States that EPA identified through its rulemaking process as significantly contributing to downwind nonattainment of the 1997 $PM_{2.5}$ and ozone NAAQS. *Id.* at 25,162. The rule did not impose any independent obligations to satisfy section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. Instead, it provided that the covered States would fully satisfy their section-7410(a)(2)(D)(i)(I) obligations by adopting SIPs that implemented the required reductions, which EPA derived by considering impacts only on downwind areas actually in nonattainment. *Id.* at 25,193 & n.45.

Like the NO_x SIP Call, CAIR required States to revise their SIPs, and it gave them the full 18 months to do so. *Id.* at 25,162, 25,263; 42 U.S.C. § 7410(k)(5). Only if a State failed to submit an approvable SIP could EPA impose a CAIR FIP. And although EPA did propose and ultimately finalize certain FIPs, those FIPs "in no way preclude[d] a State from developing its own SIP . . . ." 71 Fed. Reg. 25,328, 25,339 (Apr. 28, 2006). EPA explained that it had "considered the timing of each element of the FIP process to make sure to preserve each State's freedom to develop and implement SIPs." *Id.* at 25,340.

On judicial review, the D.C. Circuit held that CAIR's significant-contribution analysis was invalid.

North Carolina v. EPA, 531 F.3d 896, 917-21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had impermissibly failed to give independent effect to section 7410(a)(2)(D)(i)(I)'s "interfere with maintenance" language. *Id.* at 909-10, 929. The court initially vacated CAIR and remanded the matter for EPA to cure "fundamental flaws" that would require re-evaluation of CAIR "from the ground up." *Id.* at 929, 930. But on rehearing, it granted EPA's request for remand without vacatur, preserving the environmental benefits of CAIR while EPA worked to promulgate a replacement. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

3. The 2011 Transport Rule was EPA's intended replacement for CAIR. 76 Fed. Reg. at 48,211. But rather than issuing a section-7410(k)(5) SIP call, EPA imposed the Transport Rule as a series of FIPs governing 27 upwind States' obligations under the 1997 annual $PM_{2.5}$ NAAQS, the 2006 24-hour $PM_{2.5}$ NAAQS, and the 1997 ozone NAAQS. *See* Pet. App. 12a; *see also* 76 Fed. Reg. at 48,212; 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the Transport Rule differed from the subset of States covered by CAIR). Simultaneously, EPA, rather than the States, decided how to implement the rule's new emissions budgets by allocating "allowances" to individual sources within the covered States. 76 Fed. Reg. at 48,208, 48,212, 48,219-20; *see* Pet. App. 19a-20a & n.11 (explaining the purpose and function of allowances).

Although the Transport Rule provided that "[e]ach state has the option of replacing these [FIPs] with [SIPs] to achieve the required amount of emission reductions from sources selected by the state," 76 Fed. Reg. at 48,209; *see* EPA Pet. 17; American Lung Association, et al. ("ALA") Pet. 13, it explained that States could not do so for the 2012 control year. 76 Fed. Reg. at 48,328. The rule did permit States to make allowance allocations beginning one year into the program (for the 2013 control year), but it restricted those SIP revisions to ones that were "narrower in scope than the other SIP revisions states can use to replace the FIPs." *Id.* at 48,212 n.8. The rule did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *Id.* at 48,327.

4. a. On judicial review, the D.C. Circuit concluded that the Transport Rule was fatally flawed for several reasons. First, as explained in the industry and labor respondents' brief in opposition, the court found that EPA exceeded the authority granted by section 7410(a)(2)(D)(i)(I) in multiple independent ways by requiring emissions reductions without regard either to the "insignificance" threshold that EPA drew for a State's inclusion in its new multi-state program or to whether those reductions were more than needed to bring about downwind NAAQS attainment. Pet. App. 3a-4a, 21a-41a. Second, as discussed below, the court of appeals found that EPA exceeded its statutory authority in simultaneously defining the covered States'

significant contributions and imposing FIPs to abate those contributions. *Id.* at 4a, 42a-61a.

Based on those flaws, the court of appeals vacated both the Transport Rule and its FIPs, remanding the matter to EPA. *Id.* at 62a-64a. But consistent with its final decision in *North Carolina*, the court ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* at 63a-64a.

b. Judge Rogers dissented, asserting that the challenges to EPA's significant-contribution analysis had not been preserved at the administrative level and criticizing several other holdings on the merits. *Id.* at 65a, 67a-70a, 95a-114a. Judge Rogers also asserted that the federalism challenge was an impermissible collateral attack on prior EPA orders, adding that, in her view, the challenge failed on the merits under the text of the Act. *Id.* at 65a-67a, 70a-95a.

5. EPA (in No. 12-1182) and ALA and four other environmental groups that intervened on EPA's behalf below (in No. 12-1183) filed petitions for a writ of certiorari. Subsequently, briefs in support of certiorari were filed by a group of States and cities (led by New York) and two corporations (Calpine and Exelon), all of which likewise supported EPA as intervenors in the court of appeals. Together, these parties assert that the court of appeals lacked jurisdiction to rule on some of the grounds it did and that some of the court of appeals' conclusions on each of those grounds were erroneous. The industry and

labor respondents' brief in opposition addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits, and this brief addresses the issues surrounding the court of appeals' analysis of EPA's FIP authority.

REASONS TO DENY THE PETITIONS

Unable to identify a circuit split, the petitioners attempt to show that the court of appeals erroneously invalidated an EPA rule of broad importance. That assertion fails for the reasons noted below. But the petitioners' request for review is also marred by threshold questions that, far from providing a basis for granting certiorari, stand as obstacles to review of the primary questions presented. For each of those reasons, and for the additional reasons identified in the industry and labor respondents' brief in opposition, the petitions for a writ of certiorari should be denied.

I. THERE IS NO CIRCUIT SPLIT, AND THE WAIVER AND UNTIMELINESS ARGUMENTS CHALLENGE FACTBOUND APPLICATION OF SETTLED LAW.

1. Where, as here, a lower court's opinion neither creates nor deepens a split of authority on an important point of federal law, a certiorari petition will occasionally succeed by showing that the lower court "decided an important question of federal law that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). But "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the

misapplication of a properly stated rule of law." *Id.* R. 10.

The petitioners do not contend that the court of appeals misstated the settled law that governs their threshold issues regarding waiver and untimeliness. Rather, they assert that the court misapplied the properly stated rules of law that govern those issues. EPA Pet. 12-14, 18-21; ALA Pet. 16-20, 30-31. That assertion only undermines their request for certiorari.

2. The petitioners' arguments on the merits fare no better. As the industry and labor respondents explain in their brief in opposition, the petitioners' waiver argument fails for a variety of reasons. And as explained below, the petitioners' untimeliness argument fails not only because it mischaracterizes the relief that the upwind States requested and obtained in the D.C. Circuit, but also because it overlooks key portions of the record.

a. In the court of appeals, the States' first issue asked whether EPA exceeded its authority in the Transport Rule by imposing FIPs to implement section-7410(a)(2)(D)(i)(I) obligations that EPA had not previously defined. State & Local Petitioners' CA Br. 2 (CADC Doc. 1364206). The petitioners' untimeliness argument depends on the notion that the States were actually asking something different: whether, in separate final actions taken before the Transport Rule was promulgated, EPA improperly (1) found that some States had failed to submit SIPs addressing their interstate-transport obligations

under the program in place before the Transport Rule's promulgation and (2) disapproved SIPs that other States had adopted to meet those preexisting obligations. EPA Pet. 12-14; ALA Pet. 30-31; *accord* Pet. App. 70a-82a (Rogers, J., dissenting); *see* 42 U.S.C. § 7410(c)(1)(A)–(B).

The petitioners' argument fails because, in this proceeding, the States did not challenge, and the court of appeals did not invalidate, any EPA action that predated the Transport Rule. Rather, the court of appeals invalidated the Transport Rule's simultaneous identification of the States regulated under that rule, definition of those States' section-7410(a)(2)(D)(i)(I) obligations, and imposition of FIPs to implement the new requirements. Pet. App. 42a-61a. The court also specifically addressed and rejected the untimeliness argument that the petitioners now advance. *Id.* at 61a-62a n.34.

The issue here is not, and has never been, whether 42 U.S.C. § 7410(c) authorizes EPA to issue FIPs if States fail to submit approvable section-7410(a)(2)(D)(i)(I) SIPs. Nor is it whether the earlier findings of failure and SIP disapprovals that the petitioners reference were proper under the standards applicable before the Transport Rule's promulgation. Rather, the issue is what type of FIP EPA was authorized to issue, and the answer is a FIP implementing only the requirements of those earlier programs, not a FIP implementing the Transport Rule's new requirements. *See* State & Local Petitioners' CA Br. 2, 20-31 (CADC Doc.

1364206); State & Local Petitioners' CA Reply Br. 2-10 (CADC Doc. 1364210).

The Transport Rule's rulemaking docket was the first and only place to comment on whether EPA could bypass the SIP process and impose FIPs for a wholly new multi-state program at the same time it defined covered States' section-7410(a)(2)(D)(i)(I) obligations under that program. In comments, several parties urged EPA to adhere to the statute and implement the program through SIPs. *See, e.g.*, Ohio EPA, Comments on Proposed Transport Rule 11 (Oct. 1, 2010) (D.C. Circuit Joint Appendix (CADC Doc. 1363545 ("CAJA")) 1241); Utility Air Regulatory Group, Comments on Proposed Transport Rule 23-24 (Oct. 1, 2010) (CAJA 1019-20) ("UARG Cmts."). But EPA rejected those comments and elected to adopt a final rule both creating the new program and simultaneously implementing it through FIPs. 76 Fed. Reg. at 48,208.

Only after EPA rejected, through promulgation of the final Transport Rule itself, the SIP-related comments filed in the underlying rulemaking proceeding could the respondents challenge EPA's decision to promulgate Transport Rule FIPs; the issue could not have been resolved in challenges to EPA's earlier SIP disapprovals and findings of failure under earlier programs. Although the disapprovals referenced the "proposed Transport Rule," *e.g.*, 76 Fed. Reg. 43,143, 43,144 (July 20, 2011), the findings of failure did not, *see, e.g.*, 75 Fed. Reg. 32,673 (June 9, 2010), and none of those earlier

actions discussed the debate about EPA's FIP authority that would remain unresolved until the Transport Rule was finalized.

Judicial review of those earlier actions would have required the court of appeals to assume that EPA, in the final Transport Rule, would impose FIPs for each covered State and, in so doing, reject the numerous comments urging EPA to respect the statutorily mandated SIP process. Because those comments aligned with binding precedent, the D.C. Circuit would also have had to assume that EPA would violate the law. *See, e.g.*, *Virginia v. EPA*, 108 F.3d 1397, 1406-10 (D.C. Cir. 1997); *Michigan*, 213 F.3d at 687-88.

In any event, the court of appeals' precedent on standing and ripeness would not have allowed the respondents to challenge EPA's earlier actions based on speculation about the content of a future rule. *See, e.g.*, *Clean Air Implementation Project v. EPA*, 150 F.3d 1200, 1205-07 (D.C. Cir. 1998); *La. Envtl. Action Network v. Browner*, 87 F.3d 1379, 1383-85 (D.C. Cir. 1996). That observation is especially pertinent here because the subset of States subject to the Transport Rule changed between the rule's proposal and finalization. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010).

The industry and labor respondents likewise could not have challenged the Transport Rule's unlawful circumvention of the SIP process until the final rule was promulgated. But those respondents

did suffer harm by being cut out of the process. *See* 42 U.S.C. § 7410(a)(1) (providing for reasonable notice and public hearings before adoption of a SIP); *id.* § 7410(*l*) (same, for SIP revisions). And like the States, the industry and labor respondents properly raised this issue in their challenge to the Transport Rule. *See, e.g.*, Industry & Labor Petitioners' CA Br. 17 n.6 (CADC Doc. 1357526); Petitioner GenOn's Nonbinding Statement of Issues to be Raised in CA 2 (CADC Doc. 1335597); UARG Cmts.

Despite Judge Rogers's suggestions in dissent, Pet. App. 70a-71a, adjudication of the respondents' challenge to the Transport Rule's FIP-before-SIP approach did not ignore or alter the jurisdictional character of 42 U.S.C. § 7607(b)(1) and similar provisions specifying the timing of judicial review. The court of appeals merely applied the law to the particular facts of this case, in which EPA simultaneously determined which States would be subject to a new section-7410(a)(2)(D)(i)(I) rule, quantified their significant contributions, and imposed FIPs to abate those contributions. *Id.* at 4a, 42a-43a, 48a-49a, 55a-57a, 61a n.34.

b. Regardless, even assuming the petitioners and Judge Rogers are correct that some of the States forfeited their challenge to the Transport Rule's FIP-before-SIP approach by failing to challenge EPA's pre-Transport Rule findings of failure and disapprovals with respect to the 2006 24-hour $PM_{2.5}$ NAAQS, *see id.* at 71a-74a (Rogers, J., dissenting), their argument does not reach several other States

covered by the Transport Rule for the 1997 NAAQS. Before the Transport Rule was promulgated, EPA took no final action on Texas's interstate-transport SIP revision as to the 1997 NAAQS, and it *approved* eight other States' submissions. *E.g.*, 72 Fed. Reg. 55,659, 55,659 (Oct. 1, 2007).

For those eight States, the first 1997-NAAQS SIP *disapprovals* came through the Transport Rule itself, in the form of purported "corrections" under 42 U.S.C. § 7410(k)(6) that were not even noticed for public comment. *See* 76 Fed. Reg. at 48,219-20; Pet. App. 48a-49a & n.29; *cf.* EPA Pet. 6 (erroneously stating that all of the SIP disapprovals were made "in separate administrative proceedings"). Although the Transport Rule asserted that *North Carolina*'s invalidation of CAIR automatically nullified EPA's prior approvals of those States' SIPs, 76 Fed. Reg. at 48,219, the agency's own actions belie that assertion. EPA continued to approve CAIR SIPs *after North Carolina* was decided. *E.g.*, 74 Fed. Reg. 53,167, 53,167 (Oct. 16, 2009). That is how EPA found itself in the awkward position that precipitated its unlawful use of section 7410(k)(6).

There could be no question that a petition for review of the Transport Rule was the first vehicle any of the States subject to this treatment had to challenge the rule's simultaneous definition of their significant contributions and its retroactive disapproval of their SIPs with respect to the 1997 NAAQS. Like Judge Rogers below, the petitioners do not argue otherwise. Indeed, they fail even to

mention this conspicuous gap in their untimeliness argument, let alone the D.C. Circuit's skepticism about EPA's use of section 7410(k)(6) to "correct" the earlier SIP approvals. *See* Pet. App. 49a n.29.

And because, under the Transport Rule, States' section-7410(a)(2)(D)(i)(I) obligations are intertwined with, and contingent upon, other States' obligations for both the 1997 and 2006 NAAQS, *see, e.g.*, *id.* at 11a-19a; EPA Pet. 8-9, 22-23, the Transport Rule's FIPs are not severable. *See North Carolina*, 531 F.3d at 929 (noting that the components of CAIR, another regional section-7410(a)(2)(D)(i)(I) program, "must stand or fall together"). For that reason, as long as even one party properly presented a challenge to its Transport Rule FIP—and here, several parties did so even under the petitioners' logic—the FIP-before-SIP issue was properly before the court of appeals.

3. Finally, it is well settled that "federal courts may not 'decide questions that cannot affect the rights of litigants in the case before them.'" *Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990)). For that reason, if the Court agrees with the petitioners' two threshold assertions, it would be unable to reach the additional issues the petitions present. The Court's work would instead be limited to error correction on factbound issues in a case with a detailed and voluminous record—a function well "outside the mainstream of the Court's functions." E. GRESSMAN ET AL., SUPREME COURT PRACTICE

§ 5.12(c)(3), at 351 (9th ed. 2007). Accordingly, the portions of the petitions that question whether the court of appeals correctly applied the CAA's settled rules regarding administrative exhaustion and the timing of judicial review are obstacles to review of the other issues that the petitioners claim warrant a grant of certiorari.

II. On the Merits, the D.C. Circuit's Analysis Comports with This Court's Precedent, the Statutory Text, and EPA's Admissions.

In rejecting the Transport Rule's imposition of FIPs before allowing for SIPs, the court of appeals accurately observed that States could not know whether they would be included in a newly proposed regional program and, if they were, what their significant contributions to downwind States would be, until EPA revealed the final rule resolving those issues. Pet. App. 8a-9a. The court explained how the CAA's overarching provisions governing the balance of state and federal responsibility, its specific provisions governing SIPs and FIPs, and this Court's precedent construing those provisions precluded the Transport Rule's approach. *Id.* at 42a-61a. For several reasons, the petitioners' challenges to that reasoning fail.

1. This Court has repeatedly confirmed the cooperative federalism at the heart of the CAA. As noted in *Train*,

> [t]he [CAA] gives [EPA] no authority to question the wisdom of a State's choices of

> emission limitations if they are part of a [SIP] which satisfies the standards of [42 U.S.C. § 7410(a)(2)], and [EPA] may devise and promulgate a specific [FIP] of its own only if a State fails to submit [a SIP] which satisfies those standards. [42 U.S.C. § 7410(c)].

421 U.S. at 79; *see also Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 470 (2001) ("It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. *See* 42 U.S.C. §§ 7407(a), 7410 (giving States the duty of developing [SIPs])."); *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the [NAAQS] were met, the power to determine which sources would be burdened by regulation and to what extent."); *accord Virginia*, 108 F.3d at 1406-10.

The petitioners do not challenge that precedent. Rather, they claim that the Transport Rule States could have, and should have, predicted the obligations that EPA would define through legislative rulemaking for each of the States ultimately covered by its latest section-7410(a)(2)(D)(i)(I) regional program—and that the covered States' failure to do so in SIPs required EPA to promulgate the Transport Rule's FIPs. *E.g.*, EPA Pet. 15-16. But as explained below, both the statutory text and EPA's admissions outside of this litigation defeat that claim.

2. The problems with the petitioners' statutory construction begin with the CAA's definition of a FIP. The statute defines a FIP as a plan to "fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [SIP]." 42 U.S.C. § 7602(y); *see also* H.R. REP. 101-490, pt. 1, at 219 (1990) (reflecting that a FIP focuses exclusively on a "deficiency" in implementing an EPA rule that a State has "fail[ed] to correct"). For that reason, EPA's FIP authority cannot exceed a State's SIP obligation.

That fundamental point resurfaces in the CAA provision governing EPA's FIP power:

> (1) [EPA] shall promulgate a [FIP] at any time within 2 years after [EPA]—
>
> > (A) finds that a State has failed to make a required submission . . . or
> >
> > (B) disapproves a [SIP] submission in whole or in part,
>
> unless the State corrects the deficiency, and [EPA] approves the plan or plan revision, before [EPA] promulgates such [FIP].

42 U.S.C. § 7410(c).

As the court of appeals explained, this provision creates a "federal backstop if the States fail to submit adequate SIPs." Pet. App. 47a. Section 7410(c) comes into play only if a State fails to meet its initial obligation to submit an adequate SIP

under section 7410(a), and a State cannot fail to meet an obligation that EPA has not yet defined. *See id.* at 46a-48a, 50a-51a; *see also id.* at 53a-55a (explaining why this reading of section 7410(a) and (c), in contrast to EPA's, comports with both the text and structure of the CAA).

For that reason, and contrary to the petitioners' reasoning, *see, e.g.*, *id.* at 75a-76a, 80a-82a (Rogers, J., dissenting), the only SIP submissions "required" under section 7410(c)(1)(A) are ones for which EPA has disclosed the requirements, and EPA cannot properly "disapprove[]" a SIP under section 7410(c)(1)(B) unless the SIP contains a deficiency that a State could have identified and avoided on its own. The court of appeals accordingly focused on whether the section-7410(a)(2)(D)(i)(I) obligations that the Transport Rule attempted to implement were among those that States were "required" to satisfy in pre-Transport Rule submissions. *Id.* at 47a. And because EPA defined those obligations for the first time in the Transport Rule, in accordance with the D.C. Circuit's earlier order to redo the necessary analysis "from the ground up," *North Carolina*, 531 F.3d at 929, they could not have been "required," 42 U.S.C. § 7410(c)(1)(A), before the Transport Rule was promulgated.

Section 7410(k)(5), the SIP-call provision, allows the process to work as intended in this context. *See* Pet. App. 47a. When EPA concludes through legislative rulemaking that a State's emissions are making a quantified significant contribution to

downwind nonattainment, it is concluding that the State's existing SIP is "substantially inadequate" under the new rule's analysis. 42 U.S.C. § 7410(k)(5); *see, e.g.*, 76 Fed. Reg. at 48,219 (Transport Rule finding that CAIR SIPs "were not adequate to satisfy . . . the statutory mandate of section [74]10(a)(2)(D)(i)(I)"). Section 7410(k)(5) explains that, in this scenario, EPA "shall require the State to revise the [SIP] as necessary" to address its newly defined significant contribution, determine which sources in the State must control emissions and to what extent, and establish a schedule for implementing the new requirements.

Section 7410(k)(5)'s mandate applies to all of the States that were unlawfully subjected to Transport Rule FIPs. With respect to some of those States, EPA attempted to avoid that mandate through use of section 7410(k)(6), which allows EPA to correct "error[s]" in past final actions. 76 Fed. Reg. at 48,219-20. Accordingly, EPA's assertion that, for each of the States covered by the Transport Rule's FIPs, EPA had either made a finding of failure to submit a SIP or disapproved the SIP that the State had submitted, EPA Pet. 15, not only erroneously assumes that those earlier actions cleared the way for some of the Transport Rule's FIPs. It also ignores EPA's unlawful treatment of the States that had submitted SIPs that EPA *approved* and then retroactively *disapproved* through use of section 7410(k)(6) in the Transport Rule itself.

That omission is no mere oversight. Both the States' prior briefing and the court of appeals' opinion questioned the Transport Rule's use of section 7410(k)(6). *See, e.g.*, Pet. App. 49a n.29. EPA simply has no valid response. If EPA could avoid section 7410(k)(5) by deeming its prior approval of a CAIR SIP an "error" capable of correction on the same day a FIP issues, section 7410(k)(5) would be superfluous. EPA could always unlock its FIP power by invalidating any of its own prior SIP approvals, thereby removing any role even for States that had, according to EPA itself, done everything that EPA asked them to do.

The petitioners' failure to mention the Transport Rule's use of section 7410(k)(6) also undermines EPA's central argument about the circumstances under which section 7410(c) requires imposition of a FIP. EPA does not assert that, under the CAA's system of cooperative federalism, it may simultaneously disapprove a SIP that it had previously approved and impose a FIP to correct the newly identified "deficiency" or "inadequacy." 42 U.S.C. §§ 7410(c)(1), 7602(y). Rather, based on its prior findings of failure and disapprovals, EPA attempts to show (albeit erroneously) that it followed the statute's proper order of operations. EPA Pet. 15.

But if EPA were to acknowledge the Transport Rule's use of section 7410(k)(6) to correct "errors" that materialized only upon promulgation of the final Transport Rule, it would either have to (1) concede

that the rule impermissibly imposed FIPs before giving several of the covered States a chance to submit SIPs addressing newly identified deficiencies or (2) make the untenable assertion that the statute authorizes that approach. Either way, its argument could not sustain the integrated, nonseverable Transport Rule.

Finally, to the extent the petitioners fault the court of appeals for construing the statute as a whole, EPA Pet. 16; *see* Pet. App. 54a (noting the "contextual and structural factors" supporting the court of appeals' analysis), they overlook not only the general principle that supports the court of appeals' approach, *see, e.g.*, *Roberts v. Sea–Land Servs., Inc.*, 132 S. Ct. 1350, 1357 (2012), but also this Court's specific application of that principle when construing the CAA. *Train*, 421 U.S. at 78. For all of these reasons, the court of appeals' statutory analysis is correct, and the petitioners' analysis is fatally flawed.

3. a. Outside of this litigation, EPA has reflected its understanding of the constraints on its FIP authority in the context of regional section-7410(a)(2)(D)(i)(I) rulemaking. *See, e.g.*, Pet. App. 51a. Those admissions further undermine the petitioners' present claims.

In support of the dissenting opinion's statutory construction, the petitioners contend that the court of appeals' reasoning is based on a flawed analogy between the act of promulgating a NAAQS and the act of defining a newly selected group of States'

significant contributions. ALA Pet. 31; *accord* NY Br. in Support of Cert. 11. But the analogy is EPA's own. In the NO_x SIP Call, EPA explained that

> [d]etermining the overall level of air pollutants allowed to be emitted in a State [included in a section-7410(a)(2)(D)(i)(I) multi-state program] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

63 Fed. Reg. at 57,369; *see id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)). As previously noted, the States covered by the NO_x SIP Call were given 12 months to prepare SIPs after EPA placed them in the program and defined their significant contributions, *see id.* at 57,451—a period that gave them "real choice" in deciding how to achieve the required reductions. *Michigan*, 213 F.3d at 688; *see* Pet. App. 56a-57a.

Similarly, CAIR gave the States included in that program 18 months to implement emissions budgets through SIPs, and EPA assured the States that its FIPs would not interfere with the SIP process. *See* 70 Fed. Reg. at 25,263; 71 Fed. Reg. at 25,330-31; Pet. App. 57a. And after EPA had defined the covered

States' obligations under section 7410(a)(2)(D)(i)(I) in the NO_x SIP Call and CAIR, the States performed their function under section 7410, developing SIPs to address those obligations. *See, e.g.*, 74 Fed. Reg. 65,446, 65,446 (Dec. 10, 2009); 66 Fed. Reg. 27,459, 27,459 (May 17, 2001).

It was the Transport Rule, not the court of appeals' opinion, that departed from the core CAA requirements that EPA acknowledged and followed in those two prior rules. In allowing no time between EPA's decision to include States in the Transport Rule and the issuance of FIPs to implement their newly defined obligations, 76 Fed. Reg. at 48,208, 48,219-20, the rule made it impossible for the covered States to formulate and adopt SIPs as contemplated by section 7410. *See* Pet. App. 48a-55a. And contrary to the petitioners' argument, EPA Pet. 15-16; *accord* Pet. App. 88a (Rogers, J., dissenting); NY Br. in Support of Cert. 9, the court of appeals' opinion did not relieve States of their section-7410 duties. As reflected in the EPA guidance documents that the court of appeals cited, Pet. App. 50a n.30, 58a-59a n.33, section 7410(a)(1) did require States to submit SIPs addressing their section-7410(a)(2) obligations independent of the regional-transport obligations that EPA defined for the first time in the Transport Rule. *See* 77 Fed. Reg. 46,361, 46,362-63 & n.7 (Aug. 3, 2012).

Like EPA's guidance documents, the court of appeals recognized that the States could not go further, and specify precise emissions-reduction

requirements for in-state sources, until EPA told them which States were covered by the Transport Rule and what overall reductions were required. As EPA has explained, while a "detailed and substantive" section-7410(a)(2)(D)(i)(I) SIP submission may be possible

> when existing data and analyses already provide the requisite information[, i]n other instances, the submission may be more preliminary and simplified, as when there is currently insufficient information to support a determination that there are interstate transport impacts, *or when other later regulatory actions are prerequisites to making such a determination.*

EPA, Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards 3 (Aug. 15, 2006) (emphasis added); *accord* Pet. App. 50a-51a.

The petitioners' reference to what States that were not part of a regional program could do, *e.g.*, EPA Pet. 17-18; *see* Pet. App. 89a-90a (Rogers, J., dissenting) (quoting CA Tr. of Oral Arg. 61), is irrelevant to States that were included in such a program. *See infra* pp. 29-33. And any assertion that the court of appeals' opinion *disturbs* the Act's system of cooperative federalism, *see* NY Br. in Support of Cert. 8-9, is not credible. States that have made the policy decision to impose no greater

burdens on in-state sources than those EPA will mandate can control in-state sources in the first instance, *id.* at 13, only after they know the overall reductions EPA will require.

The court of appeals thus confirmed that EPA need do nothing more than perform its initial, and essential, role in the section-7410 process—just as EPA did in both the NO_x SIP Call and CAIR. Importantly, EPA has recently and repeatedly acknowledged that quantifying States' significant contributions is something only it can do. *E.g.*, 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation that section 7410(a)(2)(D)(i) "contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution") (quoted in Pet. App. 51a-52a, notwithstanding EPA's contrary suggestion, *see* EPA Pet. 17); *see also* EPA Pet. 12 (describing "significant contribution" as an "ambiguous term"); Pet. App. 50a (observing that a State's section-7410(a)(2)(D)(i)(I) obligation remains "nebulous and unknown" until EPA defines it). Neither the petitioners nor the dissenting opinion offers any response to this point, which confirms that the court of appeals' understanding of EPA's and the States' respective roles under section 7410(a)(2)(D)(i)(I) matches the view that EPA has consistently taken outside of this litigation.

b. Despite EPA's admissions, the petitioners now assert that States covered by a new regional section-7410(a)(2)(D)(i)(I) program such as the Transport

Rule need not await EPA's identification of the covered States and its definition of their significant contributions because States can perform those tasks themselves. *E.g.*, EPA Pet. 17-18; ALA Pet. 32-33; *accord* 89a-90a (Rogers, J., dissenting). That assertion fails for several reasons.

First of all, and as already noted, *North Carolina* required EPA to revisit the criteria for determining States' significant contributions and other key elements of CAIR and to create an entirely new multi-state program. 531 F.3d at 929. Whether a State's SIP addressing section 7410(a)(2)(D)(i)(I) would require any emissions reductions at all would depend on whether the State would or would not be part of the new Transport Rule region. *See, e.g.*, 76 Fed. Reg. 2,853, 2,856-58 (Jan. 18, 2011) (reflecting that Delaware's SIP would be approved if Delaware was ultimately excluded from the Transport Rule program, *see* ALA Pet. 32; NY Br. in Support of Cert. 14, and that the exact same SIP would be disapproved, and a Transport Rule FIP imposed, if Delaware was ultimately included in the program).

EPA, however, did not determine which States would be part of the Transport Rule region until the final rule was promulgated. The proposed rule reflected that Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia would be covered by the final rule, even though none was, and that Texas would be excluded from the final rule's annual $PM_{2.5}$ program, even though it was ultimately

included in that program. *Compare* 76 Fed. Reg. at 48,212-14 *with* 75 Fed. Reg. at 45,215.

And as to their substantive emissions-reduction obligations, States could do all the measurements, calculations, and predictions they wanted before the Transport Rule was promulgated, but only *EPA's* measurements, calculations, and predictions announced in the final rule informed what reductions, if any, were required in any particular State. Again, if a State was outside of the program, EPA approved its SIP without reductions; if a State was covered by the program, EPA disapproved its SIP and imposed the Transport Rule's reduction obligations. *See, e.g.*, 76 Fed. Reg. 53,638, 53,638 (Aug. 29, 2011) (final Delaware approval); 76 Fed. Reg. at 43,143 (final Kansas disapproval).

For a regional section-7410(a)(2)(D)(i)(I) program, EPA's complex emissions-transport modeling relies on numerous evolving input assumptions, many of which require subjective judgment that can alter the final output. *See* 76 Fed. Reg. at 48,263 (introducing an unproposed "emissions leakage" theory under which EPA's determination of whether some States had significant contributions to ozone nonattainment depended on predictions about how other States would react if they were covered by the final Transport Rule); Calpine Br. in Support of Cert. 26-28; *see also* EPA Primary Response to Comments on the Proposed Transport Rule, EPA-HQ-OAR-2009-0491-4513, at 470 (June 2011) (CAJA 1779) (reflecting that "EPA made numerous updates and

corrections to its significant contribution analysis" between the proposed and final versions of the Transport Rule). Indeed, EPA made additional revisions to the Transport Rule nearly ten months *after* its promulgation. 77 Fed. Reg. 34,830 (June 12, 2012).

Moreover, even assuming States could track the moving target of EPA's emissions modeling, they would still be unable to ensure that their own calculations of required reductions would match EPA's because EPA's analysis ultimately turned on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248; Pet. App. 15a-18a. In defining the required reductions in the Transport Rule, EPA developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248. It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality and identified "significant cost thresholds," or "point[s] along the cost curves where a noticeable change occurred in downwind air quality." *Id.* at 48,249. So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA's cost curves would look like, but also what changes on those curves would be most "noticeable" to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention, EPA

Pet. 8, 22, only further decreases the likelihood of matching EPA's analysis. And because downwind States are also required to control their own emissions, *see* 76 Fed. Reg. at 48,252, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.

The combination of all of these variables and the discretionary nature of EPA's consideration of them belie any claim that States could anticipate EPA's final rulemaking judgments. The court of appeals therefore correctly recognized that States could not know whether, or what, section-7410(a)(2)(D)(i)(I) reductions would have to be provided for in SIPs until EPA decided whether they were in or out of its multi-state program and, if they were in, what their specific reduction obligations were. *See* Pet. App. 50a-61a.

III. Under the D.C. Circuit's Opinion, EPA Can Still Implement the Statute, and the Claims of Health Impact Are Exaggerated.

The petitioners attempt to bolster the importance of this case by arguing that the court of appeals' decision will make EPA's task of developing section-7410(a)(2)(D)(i)(I) regional programs more difficult and that denying the petitions will negatively affect public health. *E.g.*, EPA Pet. 11, 28-32; ALA Pet. 3-4; NY Br. in Support of Cert. 15-19. Each of those arguments is flawed.

1. On the first point, EPA does not assert that following the statute's proper order of operations is impossible in this context. *See* EPA Pet. 28-29; *accord* NY Br. in Support of Cert. 15, 18. After all, both the NO_x SIP Call and CAIR reflect that EPA can honor the CAA's cooperative-federalism structure when promulgating regional rules under section 7410(a)(2)(D)(i)(I).

EPA nonetheless claims that meeting NAAQS attainment deadlines has now become more difficult or even "could[,] in some cases[,] [be] impossible." EPA Pet. 12, 16-17, 29-30. That assertion overlooks a point that the industry and labor respondents' brief in opposition highlights: most downwind areas identified in the Transport Rule as nonattainment areas or areas with maintenance problems are already in attainment under CAIR and other emissions-reduction programs. Moreover, to the extent that inability to meet attainment deadlines as a result of interstate transport remains a problem, it is a problem of EPA's own creation, resulting from the agency's unprecedented embrace of an unlawfully aggressive view of its FIP power. Finally, at this stage, the potential inability to meet NAAQS attainment deadlines would not be resolved even if the Court granted review and reversed the court of appeals' judgment based on the subset of challenges to the Transport Rule at issue here.

All along, EPA has had a duty to perform its task under the CAA's system of cooperative federalism in a timely manner, so that the rest of the process could

unfold on time. And the difficulty of complying with a statute does not license an agency to violate it. If EPA is dissatisfied with the current state of its section-7410(a)(2)(D)(i)(I) program, it can either formulate a new regional program under that provision or seek to advance its regulatory objectives through one of the other tools that the CAA provides. If EPA believes that the Act's cooperative-federalism structure would unduly hinder either of those approaches, its proper audience is Congress, not the Court.

2. The petitioners' health claims are based on a false premise: that the Transport Rule's vacatur left interstate transport of air pollution unregulated. *See, e.g.*, EPA Pet. 31 (citing health data based on that premise); ALA Pet. 11 (same). But as explained in the industry and labor respondents' brief in opposition, the court of appeals' judgment leaves CAIR in effect, *see* Pet. App. 64a, and the combination of CAIR and other measures to improve air quality has resulted in widespread NAAQS attainment. Once again, EPA is the one empowered to build upon the health benefits of CAIR to the extent necessary and appropriate under the CAA by taking swift action to define States' section-7410(a)(2)(D)(i)(I) obligations in a manner consistent with the statutory framework, so that States can meet their obligations to satisfy any requirements EPA lawfully sets.

IV. Alternative Grounds to Affirm Make This Case a Poor Candidate for Further Review.

Further review is unwarranted even assuming the petitioners' statutory analysis is correct because the court of appeals' judgment is subject to affirmance on alternative grounds. The most prominent of these is the court's express rejection of EPA's erroneous view of its authority under section 7410(a)(2)(D)(i)(I). Pet. App. 3a-4a, 21a-41a (holding that EPA's implementation of section 7410(a)(2)(D)(i)(I) was flawed in three independent respects). Both the upwind States and the industry and labor respondents asserted that the Transport Rule was invalid for that reason alone, State & Local Petitioners' CA Br. 31-37 (CADC Doc. 1364206); Industry & Labor Petitioners' CA Br. 19-26 (CADC Doc. 1357526), and the upwind States support the industry and labor respondents' brief in opposition addressing that issue here.

But there are several other grounds supporting the court of appeals' judgment that were asserted below but not reached, and a prevailing party is "free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979). Two grounds addressed in the upwind States' briefs to the court of appeals fall into that category.

1. First, the Transport Rule attempted to follow *North Carolina*'s mandate to give independent meaning to "interfere with maintenance" in section 7410(a)(2)(D)(i)(I). 531 F.3d at 909-10, 929; 76 Fed. Reg. at 48,227-28; *see* Pet. App. 40a n.25. But the only difference between its significant-contribution and interference methodologies involved the identification of downwind air-quality monitors. *See* 76 Fed. Reg. at 48,211, 48,233-36 (explaining how EPA labeled monitors "nonattainment" or "maintenance" based solely on its emissions projections for each three-year period in 2003-2007).

The Transport Rule's ultimate emissions-reduction methodology was the same for both nonattainment and maintenance monitors. *Id.* at 48,236. For each, EPA used modeling to identify States whose maximum downwind contributions exceeded an "insignificance" threshold of 1% of the relevant NAAQS, then imposed emissions budgets reflecting the amount those States could emit after imposing cost-effective controls. *Id.* at 48,246-64. In failing to draw any true distinction between "contribute significantly to nonattainment" and "interfere with maintenance," 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA violated both the statutory text and *North Carolina*, and the rule is invalid for that reason alone.

2. EPA also violated the CAA's notice-and-comment requirements, 42 U.S.C. § 7607(d), by promulgating a final Transport Rule that was far from a "logical outgrowth," *Long Island Care at*

Home, Ltd. v. Coke, 551 U.S. 158, 174 (2007); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983), of the version of the rule it proposed. For example, the final rule "linked" States to monitors in different downwind areas, *compare, e.g.*, 76 Fed. Reg. at 48,241-44, 48,246 (Tables V.D–2-3, 5-6, 8-9) *with* 75 Fed. Reg. at 45,257-70 (Tables IV.C–14-21), reduced individual States' proposed emissions budgets by as much as 50%, *compare, e.g.*, 76 Fed. Reg. at 48,269-70 (Tables VI.F–1-3) *with* 75 Fed. Reg. at 45,291 (Tables IV.E.–1-2), and reversed the proposed rule's conclusion that Texas would be excluded from the Transport Rule's annual SO_2 and NO_x programs. *Compare* 76 Fed. Reg. at 48,269 *with* 75 Fed. Reg. at 45,215-16, 45,282-84.

Had EPA provided adequate notice, the States and other interested parties would have submitted comments that would have required alteration of the final rule in several significant respects. For that additional reason, the rule would remain invalid even if the petitioners prevailed on the issues they present here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

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IN THE

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In vacating the Transport Rule, the court of appeals rewrote core Clean Air Act provisions, greatly weakening protections for downwind states facing statutory attainment deadlines and for millions of Americans harmed by intractable interstate air pollution problems. The majority did "precisely what *Chevron* prevents," "'substituting [its] own interstitial lawmaking' for that of [the] agency," *City of Arlington v. FCC*, No. 11-1545, slip op. 14 (2013) (citation omitted).

As the petitions and supporting briefs demonstrated, this Court's review is warranted because the decision:

(1) took statutory language that is as interlaced with technical complexities and more ambiguous than that in *Chevron* itself ("stationary source"), and, oblivious to practical consequences, prescribed in place of the agency's reasonable interpretation a detailed code to govern future interstate transport regulations (Pet. 21-30; EPA Pet. 18-28; Calpine/Exelon Br. 14-29);

(2) rested its decision on statutory arguments that were not raised "during the period for public comment," 42 U.S.C. 7607(d)(7)(B) (Pet. 16-20; EPA Pet. 18-21); and

(3) overrode express statutory language to declare the Good Neighbor provision inoperative until EPA promulgates implementing regulations, thereby disabling EPA from ensuring timely reductions in interstate pollution (Pet. 30-34; EPA Pet. 30-34; State Supporting Br. 8-19).

The decision leaves the law governing interstate air pollution in disarray—as evidenced by respondents' heavy reliance, as a supposed reason to *deny* certiorari, on the continued operation of CAIR, the Transport Rule's precursor, which the D.C. Circuit *invalidated* five years ago, in part because it failed to deliver downwind states sufficiently timely relief and ignored the statute's "interfere with maintenance" requirement.

The briefs in opposition fail to rebut petitioners' and supporting respondents' showing that the decision violates fundamental principles of judicial review and hobbles Congress's chosen means to protect downwind states from air pollution they themselves cannot abate.

I. The Court of Appeals Usurped the Agency's Role and Misread the Good Neighbor Provision in Ways that Seriously Weaken its Efficacy.

The Good Neighbor provision requires that state plans contain adequate provisions prohibiting emissions "in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State[.]" 42 U.S.C. 7410(a)(2)(D). Despite having previously recognized the "ambiguity" of this provision, see *Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000), here the D.C. Circuit construed it to impose an array of requirements that displace agency expertise in an especially "technical and complex arena," *Chevron, U.S.A. Inc. v. NRDC*, 467 U.S. 837, 863 (1984). The court never grappled with practical considerations and constraints that EPA identified in the record as

centrally important to any effort to implement Congress's directives. See Pet. 23-30; see also Calpine/Exelon Br. 24-28 (discussing decision's impact on EPA's ability to use the market-based regulatory devices overwhelmingly favored (*id.* at 3) by the electric power industry).

"Over-Control." Industry respondents contend that the Transport Rule would remove more pollution than the Act allows, and that less costly controls would have allowed downwind states to attain the NAAQS. See Ind. Opp. 12-14. However, EPA reasonably established thresholds for reductions based on careful analysis of market and air quality conditions. See ALA Pet. 23-24; App. 114a ("no support" for "collective over-control" ruling) (Rogers, J., dissenting).

EPA demonstrated that, under the Transport Rule, emissions reductions from *all* upwind "significant contributors" serve the goal of eliminating resulting attainment and maintenance problems at *all* downwind attainment and maintenance locations. See EPA Pet. 7-8; 27-28. Industry respondents complain that the Rule results in air quality at many downwind areas that is "*superior to* the relevant NAAQS[.]" Ind. Opp. 12 (citing JA 2964) (emphasis in original). But the Transport Rule focuses on eliminating upwind contributions to nonattainment and maintenance problems in the downwind locations with the poorest air quality, not the locations that achieve compliance most readily. See, *e.g.*, JA 2964 (Allegheny, Pennsylvania monitor projected to be just below or potentially over the NAAQS in 2014). After

balancing a number of factors, *including* avoidance of "over-control," see, *e.g.*, JA 2311-12, EPA chose an approach that most cost-effectively achieved and maintained the relevant NAAQS not only for Madison, Illinois, but also for Allegheny, Pennsylvania and other locations with more stubborn air quality problems. See also Pet. 23.

Industry respondents also allege that "less costly controls would still have allowed downwind States to attain [the] NAAQS[.]" Ind. Opp. 12 (citing JA 1066-68; 1374). This argument—on a matter squarely within EPA's expertise—is baseless. Further, industry respondents ignore EPA's explanation that lower cost thresholds would provide an economic incentive to cease operating *existing* pollution controls and would *increase* emissions and associated contributions to downwind areas. See 76 Fed. Reg. at 48256-57. Respondent Southern Company's own comments, JA 1374 at Table XI-3, showed that downwind attainment and maintenance benefits continue to accrue up to EPA's $500 per ton of SO_2 threshold. Moreover, EPA's adoption of a two-threshold approach for SO_2, with a $2,300 threshold for higher contributors and $500 for lower ones, was designed to take account of differences in relative contributions. 76 Fed. Reg. at 48252. Furthermore, industry respondents—like the D.C. Circuit majority—ignore the statute's mandate to address attainment *and* maintenance problems. See Ind. Opp. 11 (asserting, incorrectly, that "[o]nce a downwind location achieves attainment, EPA's authority to regulate upwind emissions ceases"). See *North Carolina v. EPA*, 531 F.3d 896, 908-11 (D.C.

Cir. 2008) (requiring EPA to give effect to the statutory phrase "interfere with maintenance").

"Proportionality." Industry respondents' defense of the D.C. Circuit majority's "proportionality" ruling, Opp. 24-30, also fails. As we demonstrated, Pet. 25-28, the majority's "proportionality" constraint cannot reasonably be derived from the statutory text and is impossible to satisfy whenever multiple upwind states contribute to nonattainment in multiple downwind states. *Cf.* App. 26a & n.15 (court's example, in which there is only a single downwind state). Industry respondents suggest, see Opp. 29, that the majority's requirement is not so rigid as to be arithmetically impossible, referencing the majority's statement that "it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States," and that in those cases EPA has "some discretion about how to reasonably avoid such over-control." App. 29a. But that passage addresses not the proportionality requirement, but "over-control," *i.e.*, driving air quality below the NAAQS, an issue that industry respondents recognize is "independent," "distinct," and "separate," Opp. 24, from proportionality. See also App. 25a-27a, 29a.

Some measure of discretion to depart from proportionality when "ratcheting down" requirements to avoid over-control does not answer the more fundamental problem with the court's "proportionality" requirement. See JA 2312 (observing that "most upwind states contribute to multiple downwind monitors (in multiple states) and

would have a different reduction percentage for each one").

No rulemaking commenter raised the statutory theory that the court would later adopt, but EPA explained the infeasibility of a methodology driven by proportionality in connection with an analysis of possible policy alternatives. The panel ignored EPA's explication of the real-world problems with a "proportional" approach. See Pet. 26.

Respondents have no answer for the demonstrations, Pet. 26; see also EPA Pet. 22-23; Calpine/Exelon Br. 21-23, that the majority's requirements cannot survive real-world conditions. This impracticability underscores the perils of de novo judicial policymaking. See *Chevron*, 467 U.S. at 844; *City of Arlington*, slip op. at 13-14.

Unexhausted Statutory Objections. By reaching out to decide statutory theories that were not presented to the agency, see Pet. 16-20, 25, the court below acted without the benefit of a proper administrative record as it advanced its own analysis of how interstate transport policy should be structured. See, *e.g.*, Pet. 26. Industry respondents, Opp. 16-19, recapitulate the strained rationales cited by the majority, but none comports with the requirement that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. 7607(d)(7)(B).[1] Industry respondents fault ALA

[1] Like the theory that the 1% screening threshold in the first step of EPA's approach to defining states' significant contributions operates as a strict statutory limit, the majority's

petitioners for not having briefed waiver below, although their own opening brief below gave the 1% threshold theory scant attention as part of a broader arguments that EPA had misapplied the statutory "significant contribution" concept, see Industry Petitioners C.A. Br. 20-23 (Doc. 1357526). As ALA's counsel noted at oral argument, the 1% threshold issue had not been raised before the agency and was the "post hoc" creation of litigation counsel. Arg. Trans. 84 (April 13, 2012).

II. The D.C. Circuit's Holding that States' Good Neighbor Obligations are Contingent Upon EPA Quantifying Regulations is Contrary to the Statute and Highly Problematic.

In an effort to find statutory support for the court of appeals' ruling that states need not fulfill their Good Neighbor obligations until defined by EPA, the state and local respondents, Opp. 21, attempt to rely on 42 U.S.C. 7602(y) (the definition of federal implementation plan). This provision, however, is of no assistance, because it merely defines a federal plan as "a plan (or portion thereof)" issued by EPA "to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a [state plan]." *Id.* In addressing EPA's power to issue FIPs, Congress specified that a "gap" exists when either a

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"proportionality" requirement was not raised in administrative proceedings. See Pet. 25; App. 111a (dissent). Industry respondents, Opp. 24 n.11, fail to point to any timely objection as to the latter issue, referring only to EPA's discussion of different policy approaches it considered, 75 Fed. Reg. at 45299; JA 2311-12. See also Pet. 26.

state fails to make a "required" submission or EPA disapproves such a submission; when such a "gap" exists, EPA must issue a FIP to remedy it. 42 U.S.C. 7410(c)(1). State and local respondents argue that the only "required" submissions are those "for which EPA has disclosed the requirements," State Opp. 22, but cite no authority for this proposition, because there is none. Instead, the "required" submissions are those that the Clean Air Act mandates, and the plain language of section 7410(a)(2)(D) requires states to submit SIPs that meet the Good Neighbor requirements. So if the state has not made the required Good Neighbor submission, EPA must issue a FIP, as it did here. Nothing in section 7410, or anywhere else in the Act, creates the additional administrative requirement, manufactured by the court, that EPA must first promulgate a rule that calculates the states' Good Neighbor SIP obligations for them. See *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) (reviewing court not empowered to impose procedures not required by statute).

It is the decision below, not EPA's rulemaking, that disturbs cooperative federalism as Congress structured it in the statute. Under the statute, states are given the first opportunity to design Good Neighbor requirements tailored to the state's needs, and as petitioners pointed out, many states, on their own, develop transport plan provisions that EPA approves, Pet. at 33-34. See also State Supporting Br. 10-15. EPA steps in only if states fail to carry out their duties. State respondents suggest, however, that if a state makes "the *policy* decision to impose

no greater burdens on in-state sources than those EPA will mandate," then those states "can control in-state sources in the first instance . . . only after they know the overall reductions EPA will require." State Opp. 28-29 (emphasis added). But nothing in the statute authorizes this "wait and see" approach. Under the statute, the duty to promulgate "adequate" SIP provisions on interstate transport belongs to the states, 42 U.S.C. 7410(a)(2)(D), and there is no requirement that EPA promulgate quantifying regulations at all, let alone as a condition precedent to states' obligations.

III. The Case Presents Questions of Great Importance to Air Quality and the Ongoing Administration of the Clean Air Act.

The decision below will operate to the serious detriment of the intended beneficiaries of the Good Neighbor provision: downwind states and their residents. It consistently slights downwind states' compelling interests, particularly their interests in obtaining *timely* reductions in transported pollution, improperly creates a set of extra-statutory requirements, and impairs the nation's ability to achieve Congressional goals of meeting air quality standards nationwide. State Supporting Br. 15-19.

The Good Neighbor provision is Congress's prime mechanism for fulfilling the federal government's responsibility to protect states from pollution emanating from beyond their borders. See Pet. 5-7. The court of appeals' decision, however, creates serious impediments to crafting any workable region-wide transport regulation, because the "red

lines" the court drew, App. 22a, are (to put it mildly) poorly attuned to the realities of interstate air pollution and the electric power market, see Pet. 21-22, 29-30; Calpine/Exelon Br. 25-28, and present serious practical problems likely to make interstate rulemakings all the more complicated (and heavily litigated). See Pet. 26-27; EPA Pet. 28-32.

As the many downwind states and municipalities supporting the petitions here have explained, the decision "renders the Act's NAAQS attainment deadlines a practical nullity for downwind States." State Supporting Br. 15. See also *id.* ("Delaying enforcement of the Good Neighbor provision beyond the three-year SIP deadline set by Congress makes adherence to the coordinated timeframes imposed by the Clean Air Act virtually impossible."); EPA Pet. 31-32 (noting that the decision will "substantially delay emissions reductions by upwind states that are necessary for downwind states to attain and maintain the NAAQS"); App. 114a (Rogers, J., dissenting).

Downwind states facing nonattainment problems will suffer continued harmful air pollution and risk statutory sanctions due to these delays. See Pet. 34-35; State Supporting Br. 18-19 (explaining that "continued delay imposes an especially intolerable burden on downwind States and cities" and citing examples). Indeed, the D.C. Circuit overturned CAIR in part because EPA had not ensured that reductions in interstate transport would occur in time for downwind states' attainment deadlines. *North Carolina*, 531 F.3d at 908-12. That holding now appears not only to have been effectively annulled, but to have been replaced with new

judicially prescribed procedures almost certain to serve as a major new source of delay. See, *e.g.*, EPA Pet. 16-17; State Supporting Br. 15-16.

Relying heavily on post-decisional air quality data from 2009-2011, industry respondents allege, Opp. 7, 13, 30-31, that the Transport Rule was overly stringent when promulgated and, in any event, unnecessary given current emissions trends under CAIR. But EPA promulgated the Transport Rule to replace the judicially invalidated CAIR, not to operate alongside it. EPA "recognized that, after CAIR is terminated, the emission limitations imposed by CAIR will cease to exist," and properly refused to assume that sources would operate controls or take other emissions control measures without any legal compulsion to do so, even as the agency took account of emissions reductions expected to occur due to other federal requirements, state laws, and consent decrees, as well as reductions expected due to other factors such as the replacement of some coal-fired generation with natural gas. 76 Fed. Reg. at 48223-24, 48251.

Respondents' suggestion that the problems the Rule addressed will simply go away is too optimistic. EPA's preliminary data for 2010-2012—a period coinciding with a nascent economic recovery—demonstrate downwind states' continued challenges in meeting air quality standards. Thus, whereas industry respondents allege that only one of the original 91 ozone nonattainment areas now has air quality that violates the NAAQS, Opp. 31 (citing EPA's *2011 Progress Report*), EPA's preliminary data for 2012 show that 24% of the 91 referenced ozone nonattainment areas currently violate the

1997 health-based air quality standard.[2] And this does not include the many areas in the East currently violating the more stringent 2008 ozone standard.[3] Industry respondents also claim that fewer than 8% of the 65 "nonattainment" and "maintenance" locations under the Transport Rule currently violate the relevant NAAQS. *Id.* While even an 8% violation rate represents a public health concern, EPA's preliminary 2012 data show an overall violation rate of over 17% for the 63 "nonattainment" and "maintenance" Transport Rule locations with current data, and a 90% violation rate for the Transport Rule's ozone locations specifically.[4]

Finally, and most importantly, respondents' arguments overlook that the D.C. Circuit decision establishes a set of new legal requirements that will bind future agency interpretation and, insofar as the decision professes to "follow[] from the unambiguous terms of the statute," *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005), constrain future efforts to ensure that downwind states can achieve air quality standards. Because the D.C. Circuit would very likely have exclusive jurisdiction over

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[2] See http://www.epa.gov/ttn/analysis/docs/Ozone_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 3b (see, *e.g.*, 2010-2012 "design values" for Baltimore, MD; Sheboygan, WI; Washington, DC; and Cincinnati, OH).

[3] See *id.* Tables 1a, 2.

[4] See Ind. Opp. n.13; compare http://www.epa.gov/ttn/analysis/docs/Ozone_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 6, and http://www.epa.gov/ttn/analysis/docs/PM2.5_DesignValues_20102012_DRAFT_05_20_13.xlsx, Table 5 (showing annual and 24-hour "design values"), with 76 Fed. Reg. at 48240-46.

any similar interstate air rule, see 42 U.S.C. 7607(b)(1); 76 Fed. Reg. at 48352, the court's extra-textual requirements will necessarily govern every transport rulemaking for each and every NAAQS revision going forward. A "circuit split," State Opp. 11, is therefore unlikely ever to emerge on these issues.

The lower court erroneously held that states have no Good Neighbor obligations until EPA has issued a quantifying rulemaking—this despite plain statutory language placing the Good Neighbor obligation directly on each state, see 42 U.S.C. 7410(a)(2)(D), and despite states' capacity to prepare their own transport SIPs, see State Supporting Br. 13-14. This error will magnify the importance of the court's other missteps because the very existence of the Clean Air Act's Good Neighbor obligation now hinges upon the ability of EPA's quantifying rulemakings to survive D.C. Circuit review under the unworkable regime created by *Michigan*, *North Carolina* and the decision below. The result is a "potentially endless loop of delay," State Supporting Br. 16, that imperils the protections Congress sought to provide downwind states and their citizens.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JOINT APPENDIX

Nos. 12-1182 and 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11-1302

EME HOMER CITY GENERATION, L.P., PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS

SAN MIGUEL ELECTRIC COOPERATIVE, ET AL.,
INTERVENOR FOR PETITIONER

AMERICAN LUNG ASSOCIATION; CALPINE CORPORATION; CLEAN AIR COUNCIL; ENVIRONMENTAL DEFENSE FUND; EXELON CORPORATION; NATURAL RESOURCES DEFENSE COUNCIL; PUBLIC SERVICE ENTERPRISE GROUP, INC.; SIERRA CLUB; CITY OF BRIDGEPORT, CONNECTICUT; CITY OF CHICAGO; CITY OF NEW YORK; CITY OF PHILADELPHIA; MAYOR AND CITY COUNCIL OF BALTIMORE; STATE OF ILLINOIS; STATE OF NEW YORK; STATE OF NORTH CAROLINA; COMMONWEALTH OF MASSACHUSETTS; DISTRICT OF COLUMBIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF MARYLAND; STATE OF RHODE ISLAND; STATE OF VERMONT, INTERVENORS FOR RESPONDENT

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AMERICAN THORACIC SOCIETY, AMICUS CURIAE FOR
RESPONDENT

INDUSTRIAL ENERGY CONSUMERS OF AMERICA; SOUTHEASTERN LEGAL FOUNDATION, INC., AMICI CURIAE FOR PETITIONER

Consolidated with 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395

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DATE	PROCEEDINGS
8/23/11	PETITION FOR REVIEW CASE docketed. [11-1302]
8/23/11	PETITION FOR REVIEW filed [1325720] by EME Homer City Generation, L.P. of a decision by federal agency [Service Date: 08/23/2011] Disclosure Statement: Attached; Certificate of Parties: Not Applicable to this Filing [11-1302]—[Edited 08/24/2011 by HTS—Modified PDF Attachment]
8/24/11	CLERK'S ORDER filed [1325733] directing party to file initial submissions: PETITIONER docketing statement due 09/23/

DATE	PROCEEDINGS
	2011. PETITIONER certificate as to parties, etc. due 09/23/2011. PETITIONER statement of issues due 09/23/2011. PETITIONER underlying decision due 09/23/2011. PETITIONER deferred appendix statement due 09/23/2011. PETITIONER procedural motions due 09/23/2011. PETITIONER dispositive motions due 10/11/2011; directing party to file initial submissions: RESPONDENT entry of appearance due 09/23/2011. RESPONDENT procedural motions due 09/23/2011. RESPONDENT certified index to record due 10/11/2011. RESPONDENT dispositive motions due 10/11/2011 [11-1302]
8/24/11	CERTIFIED COPY [1325747] of Petition for Review sent to respondent [1325720-2] [11-1302]
8/25/11	ENTRY OF APPEARANCE filed [1325907] by Gregory G. Garre and co-counsel Claudia O'Brien Lori Alvino McGill Stacey VanBelleghem Katherine Twomey on behalf of Petitioner EME Homer City Generation, L.P.. [11-1302] (Garre, Gregory)

DATE	PROCEEDINGS
8/25/11	MOTION filed [1325939] by EME Homer City Generation, L.P. to stay underlying order in case (Response to Motion served by mail due on 09/09/2011). (Response to Motion served by hand due on 09/06/2011), to expedite case. (Response to Motion served by mail due on 09/09/2011). (Response to Motion served by hand due on 09/06/2011) [Service Date: 08/25/2011 by Hand Delivery, CM/ECF NDA] Pages: 16-20. [11-1302] (Garre, Gregory)
8/29/11	ENTRY OF APPEARANCE filed [1326487] by Norman Louis Rave, Jr. on behalf of Respondent EPA. [11-1302] (Rave, Norman) *UNOPPOSED* MOTION filed [1326782] by EPA to extend time to file response to 09/09/2011. [Service Date: 08/30/2011] Pages: 1-10. [11-1302] (Rave, Norman)
8/30/11	*UNOPPOSED* MOTION filed [1326782] by EPA to extend time to file response to 09/09/2011. [Service Date: 08/30/2011] Pages: 1-10. [11-1302] (Rave, Norman)
8/31/11	CLERK'S ORDER filed [1326981] granting motion to extend time [1326782-2]; response to motion to stay case [1325939-2] or to expedite case [1325939-3] now due on 09/09/2011 [11-1302]
9/7/11	MODIFIED PARTY FILER—MOTION filed [1328127] by Exelon Corporation for

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	leave to intervene [Disclosure Listing: Attached] [Service Date: 09/07/2011] [11-1302] —[Edited 09/08/2011 by HTS] (Collins, Brendan)
9/9/11	RESPONSE IN OPPOSITION FILED [1328647] by EPA to motion to stay case [1325939-2], motion to expedite case [1325939-3] [Service Date: 09/09/2011 by CM/ECF NDA] Pages: 16-20. [11-1302] (Rave, Norman)
9/9/11	RESPONSE IN OPPOSITION FILED [1328718] by Exelon Corporation to motion to stay case [1325939-2], motion to expedite case [1325939-3] [Service Date: 09/09/2011 by CM/ECF NDA] Pages: 21-30. [11-1302] (Collins, Brendan)
9/9/11	MODIFIED PARTY FILER—MOTION filed [1328729] by Clean Air Council, Environmental Defense Fund, Sierra Club for leave to intervene [Disclosure Listing: Attached] [Service Date: 09/09/2011] [11-1302] —[Edited 09/12/2011 by LMC] (Donahue, Sean)
9/9/11	MODIFIED EVENT—MOTION filed [1328730] by Clean Air Council, Environmental Defense Fund, Sierra Club [Disclosure Listing: Previously Filed] for leave to file response to motion for stay (Response to Motion served by mail due on 09/22/2011) [Ser-

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	vice Date: 09/09/2011] [11-1302]—[Edited 09/12/2011 by LMC] (Donahue, Sean)
9/12/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1328817] by Clean Air Council, Environmental Defense Fund and Sierra Club to motion to stay case [1325939-2], motion to expedite case [1325939-3] [Service Date: 09/12/2011 by CM/ECF NDA] Pages: 21-30. [11-1302]—[Edited 09/12/2011 by LMC]—[Edited 10/19/2011 by HTS] (Donahue, Sean)
9/14/11	CLERK'S ORDER filed [1329532] consolidating cases 11-1315, 11-1323 (Consolidation started 09/14/2011) with 11-1302; directing party to file in 11-1323 initial submissions: PETITIONER docketing statement due 10/14/2011. PETITIONER statement of issues due 10/14/2011 [11-1302, 11-1315, 11-1323]
9/14/11	MOTION filed [1329612] by GenOn Energy, Inc. in 11-1323 to stay underlying order in case (Response to Motion served by mail due on 09/29/2011), to expedite case. (Response to Motion served by mail due on 09/29/2011) [Service Date: 09/14/2011 by CM/ECF NDA, US Mail] Pages: 16-20. [11-1323] (Holmstead, Jeffrey)
9/15/11	MOTION filed [1329866] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining

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	Company, LLC, Luminant Energy Company, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC to stay underlying order in case (Response to Motion served by mail due on 09/29/2011) [Service Date: 09/15/2011 by CM/ECF NDA] Pages: 16-20. [11-1315] (Keisler, Peter)
9/16/11	*UNOPPOSED* MOTION filed [1330154] by EME Homer City Generation, L.P. to exceed page limits in reply (Response to Motion served by mail due on 09/29/2011) [Service Date: 09/16/2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Garre, Gregory)
9/16/11	MODIFIED EVENT FROM FILED TO LODGED—REPLY FILED [1330156] by EME Homer City Generation, L.P. to response [1328647-2], [1328718-2] [Service Date: 09/16/2011 by CM/ECF NDA] Pages: 16-20. [11-1302]—[Edited 09/19/2011 by HTS] (Garre, Gregory)
9/20/11	ENTRY OF APPEARANCE filed [1330706] by Norman L. Rave, Jr. and co-counsel Jon M. Lipshultz on behalf of Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323. [11-1302, 11-1315, 11-1323] (Lipshultz, Jon)

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9/20/11	*UNOPPOSED* MOTION filed [1330711] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323 to extend time to file response to 10/06/2011. Pages: 1-10. [11-1302, 11-1315, 11-1323] (Lipshultz, Jon)
9/22/11	CLERK'S ORDER filed [1331019] consolidating cases 11-1329 (Consolidation started 09/22/2011) with 11-1302; directing party to file in 11-1329 initial submissions: PETITIONER docketing statement due 10/24/2011. PETITIONER statement of issues due 10/24/2011 [11-1302, 11-1315, 11-1323, 11-1329]
9/22/11	CLERK'S ORDER filed [1331080] consolidating cases 11-1338 (Consolidation started 09/22/2011) with 11-1302; directing party to file in 11-1338 initial submissions: PETITIONER docketing statement due 10/24/2011. PETITIONER statement of issues due 10/24/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338]
9/22/11	MOTION filed [1331171] by American Lung Association for leave to intervene [Disclosure Listing: Attached] [Service Date: 09/22/2011] [11-1302] (Marshall, David)
9/22/11	RELIEF REPLACED—Revised Corporate Disclosure Statement filed [1331180] by American Lung Association for leave to intervene [Disclosure Listing: Attached] [Ser-

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9/22/11	INCORRECT DOCKET ENTRY-DISREGARD—(CORRECTED ON 9/26/11) MODIFIED PARTY FILER—MOTION filed [1331218] by Natural Resources Defense Council for leave to intervene [Disclosure Listing: Attached] [Service Date: 09/22/2011] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338]—[Edited 09/26/2011 by HTS] (Walke, John)
9/22/11	*CORRECTED* MOTION filed [1331220] by Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 for partial stay of final rule. (Response to Motion served by mail due on 10/06/2011) [Service Date: 09/22/2011 by CM/ECF NDA] Pages: 21-30. [11-1338] (Davis, Bill)
9/22/11	MOTION filed [1331221] by Calpine Corporation for leave to intervene [Disclosure Listing: Attached] [Service Date: 09/22/2011] [11-1302] (Rubin, James)
9/23/11	DOCKETING STATEMENT FILED [1331249] by EME Homer City Generation, L.P. [Service Date: 09/23/2011] [11-1302] (Garre, Gregory)

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9/23/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1331250] by EME Homer City Generation, L.P. [Service Date: 09/23/2011] [11-1302] (Garre, Gregory)
9/23/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1331252] by EME Homer City Generation, L.P. [Service Date: 09/23/2011] Intent: AppxDeferred [11-1302] (Garre, Gregory)
9/23/11	STATEMENT OF ISSUES FILED [1331254] by EME Homer City Generation, L.P. [Service Date: 09/23/2011] [11-1302] (Garre, Gregory)
9/23/11	UNDERLYING DECISION IN CASE submitted [1331255] by EME Homer City Generation, L.P. [Service Date: 09/23/2011] [11-1302] (Garre, Gregory)
9/23/11	*UNOPPOSED* MOTION filed [1331311] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1338 to extend time to file response to 10/13/2011. [Service Date: 09/23/2011] Pages: 1-10. [11-1302, 11-1338] (Lipshultz, Jon)
9/23/11	MOTION filed [1331313] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338 to extend time to file initial submissions to 10/24/2011. (Response

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9/23/11	CLERK'S ORDER filed [1331402] consolidating cases 11-1340 (Consolidation started 09/23/2011) with 11-1302; directing party to file in 11-1340 initial submissions: PETITIONER docketing statement due 10/24/2011. PETITIONER statement of issues due 10/24/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340]
9/23/11	MOTION filed [1331421] by Calpine Corporation to extend time to file response to 10/06/2011. (Response to Motion served by mail due on 10/06/2011) [Service Date: 09/23/2011 by Email] Pages: 1-10. [11-1302] (Rubin, James)
9/23/11	*UNOPPOSED* MOTION filed [1331426] by American Lung Association, Clean Air Council, Environmental Defense Fund and Sierra Club in 11-1302 to extend time to file response to 10/06/2011. [Service Date: 09/23/2011] Pages: 1-10. [11-1302] (Donahue, Sean)
9/26/11	*UNOPPOSED* MOTION filed [1331499] by Exelon Corporation in 11-1302 to extend time to file response to 10/06/2011. [Service

DATE	PROCEEDINGS
	Date: 09/26/2011] Pages: 1-10. [11-1302] (Collins, Brendan)
9/26/11	*CORRECTED* MOTION filed [1331618] by Natural Resources Defense Council for leave to intervene [Disclosure Listing: Attached] [Service Date: 09/26/2011] [11-1302] (Walke, John)
9/28/11	CLERK'S ORDER filed [1332015] consolidating cases 11-1350 (Consolidation started 09/28/2011) with 11-1302; directing party to file in 11-1350 initial submissions: PETITIONER docketing statement due 10/28/2011. PETITIONER statement of issues due 10/28/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350]
9/28/11	*UNOPPOSED* MOTION filed [1332175] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350 to extend time to file response to 10/13/2011. [Service Date: 09/28/2011] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350] (Rave, Norman)
9/29/11	NOTICE FILED [1332376] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove

DATE	PROCEEDINGS
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9/29/11	MOTION filed [1332609] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to extend time to file response to 10/13/2011. [Service Date: 09/29/2011] Pages: 1-10. [11-1302, 11-1338] (Donahue, Sean)
9/30/11	*UNOPPOSED* MOTION filed [1332804] by Exelon Corporation in 11-1302 to extend time to file response to 10/13/2011. [Service Date: 09/30/2011] Pages: 1-10. [11-1302] (Collins, Brendan)
9/30/11	MOTION filed [1332836] by Calpine Corporation in 11-1302 to extend time to file response to 10/13/2011. (Response to Motion served by mail due on 10/14/2011) [Service Date: 09/30/2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Rubin, James)
9/30/11	MOTION filed [1332841] by Wisconsin Public Service Corporation in 11-1350 Motion for Partial Stay of Rule. (Response to Motion served by mail due on 10/14/2011) [Service Date: 09/30/2011 by CM/ECF NDA] Pages:

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10/3/11	CERTIFIED COPY [1332875] of Petition for Review sent to respondent [1332869-2] [11-1357]
10/5/11	CLERK'S ORDER filed [1333565] consolidating cases 11-1358, 11-1359 (Consolidation started 10/05/2011) with 11-1302; directing party to file in 11-1358, 11-1359 initial submissions: PETITIONER docketing statement due 11/04/2011. PETITIONER statement of issues due 11/04/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359]
10/5/11	ENTRY OF APPEARANCE filed [1333631] by Norman Rave and co-counsel David S. Gualtieri on behalf of Respondent EPA. [11-1302] (Gualtieri, David)
10/5/11	*UNOPPOSED* MOTION filed [1333633] by EPA to extend time to file response to 10/24/

DATE	PROCEEDINGS
	2011 at 11:59 pm. Pages: 1-10. [11-1302] (Gualtieri, David)
10/5/11	MOTION filed [1333691] by State of Kansas in 11-1329 Petitioner's Motion for Stay of Final Agency Rule. (Response to Motion served by mail due on 10/20/2011) [Service Date: 10/05/2011 by CM/ECF NDA] Pages: 21-30. [11-1329] (Nickel, Henry)
10/6/11	CLERK'S ORDER filed [1333725] consolidating case 11-1360 (Consolidation started 10/06/2011) with 11-1302; directing party to file in 11-1360 initial submissions: PETITIONER docketing statement due 11/07/2011. PETITIONER statement of issues due 11/07/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360]
10/6/11	MOTION filed [1333793] by PSEG Fossil, LLC for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 10/06/2011] [11-1302] (Blase, Kurt)
10/6/11	CLERK'S ORDER filed [1333835] consolidating case 11-1361 (Consolidation started 10/06/2011) with 11-1302; directing party to file in 11-1361 initial submissions: PETITIONER docketing statement due 11/07/2011. PETITIONER statement of issues due 11/07/2011 [11-1302, 11-1315, 11-1323, 11-1329, 11-

DATE	PROCEEDINGS
	1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1363]
10/6/11	CERTIFIED COPY [1333934] of Petition for Review sent to respondent [1333825-2] [11-1362]
10/6/11	CERTIFIED COPY [1333940] of Petition for Review sent to respondent [1333863-2] [11-1366]
10/6/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1333987] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315 [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315]—[Edited 10/19/2011 by HTS] [11-1302, 11-1315] (Lipshultz, Jon)
10/6/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1334050] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365 to motion to stay case [1329612-2], motion to expedite case [1329612-3] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364,

DATE	PROCEEDINGS
	11-1365, 11-1366, 11-1367]—[Edited 10/19/2011 by HTS] (Rave, Norman)
10/6/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION LODGED [1334064] by Calpine Corporation in 11-1302 to motion to stay case [1329612-2], motion to expedite case [1329612-3] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 21-30. [11-1323, 11-1302—[Edited 10/19/2011 by HTS] [11-1323, 11-1302] (Rubin, James)
10/6/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1334065] by Calpine Corporation in 11-1302 to motion to stay case [1329866-2] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 21-30. [11-1315, 11-1302]—[Edited 10/19/2011 by HTS] (Rubin, James)
10/6/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1334066] by Exelon Corporation in 11-1302 to motion to stay case [1329612-2], motion to expedite case [1329612-3], motion to stay case [1329866-2] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1315, 11-1323]—[Edited 10/19/2011 by HTS] [11-1302, 11-1315, 11-1323] (Collins, Brendan)

DATE	PROCEEDINGS
10/6/11	RESPONSE IN OPPOSITION FILED [1334067] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion to stay case [1329612-2], motion to expedite case [1329612-3] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1323] (Donahue, Sean)
10/6/11	RESPONSE IN OPPOSITION FILED [1334068] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion to stay case [1329866-2] [Service Date: 10/06/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315] (Hays, George)
10/7/11	*UNOPPOSED* MOTION filed [1334166] by Exelon Corporation in 11-1302 to extend time to file response to 10/24/2011. [Service Date: 10/07/2011] Pages: 1-10. [11-1302, 11-1350] (Collins, Brendan)
10/7/11	CERTIFIED COPY [1334170] of Petition for Review sent to respondent [1334168-2] [11-1371]
10/7/11	MOTION filed [1334238] by Calpine Corporation to extend time to file response to 10/24/2011. (Response to Motion served by mail due on 10/20/2011) [Service Date: 10/07/

DATE	PROCEEDINGS
	2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Rubin, James)
10/7/11	*CORRECTED* MOTION filed [1334284] by Exelon Corporation in 11-1302 to extend time to file response to 10/24/2011. (Response to Motion served by mail due on 10/20/2011) [Service Date: 10/07/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1350] (Collins, Brendan)
10/7/11	MOTION filed [1334350] by Southwestern Public Service Company Partial Stay of Final Agency Rule. (Response to Motion served by mail due on 10/20/2011) [Service Date: 10/07/2011 by CM/ECF NDA] Pages: 16-20. [11-1375] (Frank, Joshua)
10/7/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1334351] by Southwestern Public Service Company [Service Date: 10/07/2011] [11-1375] (Frank, Joshua)
10/7/11	MOTION filed [1334353] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to extend time to file response to 10/24/2011. (Response to Motion served by mail due on 10/20/2011) [Service Date: 10/07/2011 by

DATE	PROCEEDINGS
	CM/ECF NDA] Pages: 1-10. [11-1302, 11-1350] (Donahue, Sean)
10/11/11	MOTION filed [1334498] by Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana to stay underlying order in case (Response to Motion served by mail due on 10/24/2011) [Service Date: 10/11/2011 by CM/ECF NDA, US Mail] Pages: 21-30. [11-1364] (Terrell, Megan)
10/11/11	MOTION filed [1334692] by PSEG Fossil LLC to substitute party Public Service Enterprise Group, Inc. for PSEG Fossil, LLC (Response to Motion served by mail due on 10/24/2011) [Service Date: 10/11/2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Blase, Kurt)
10/12/11	MODIFIED DOCKET TEXT-CLERK'S ORDER filed [1334766] granting motion for leave to intervene. [1333793-2] in 11-1302, granting motion for leave to intervene. [1331618-2] in 11-1302, granting motion for leave to intervene. [1331221-2] in 11-1302, granting motion for leave to intervene. [1331171-2] in 11-1302, granting motion for leave to intervene. granting motion for leave to intervene. [1328729-2] in 11-1302, granting motion for leave to intervene. [1328127-2] in 11-1302 [11-1302, 11-1315, 11-1323, 11-1329,

DATE	PROCEEDINGS
	11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 10/12/2011 by TAG]—[Edited 10/12/2011 by TAG]—[Edited 10/12/2011 by TAG]
10/12/11	CLERK'S ORDER filed [1334791] consolidating cases 11-1363, 11-1364, 11-1367, 11-1365, 11-1362, 11-1366, 11-1373, 11-1371, 11-1374, 11-1375, 11-1376, 11-1377, 11-1380, 11-1381, 11-1387, 11-1372, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1391, 11-1390, 11-1392, 11-1393, 11-1394, 11-1395 (Consolidation started 10/12/2011) with 11-1302; directing party to file in 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395 initial submissions: PETITIONER docketing statement due 11/14/2011. PETITIONER statement of issues due 11/14/2011 [11-1302, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-

DATE	PROCEEDINGS
	1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
10/12/11	*UNOPPOSED* MOTION filed [1334839] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC to exceed page limits in reply [Service Date: 10/12/2011] Pages: 1-10. [11-1315] (Keisler, Peter)
10/12/11	CLERK'S ORDER filed [1334889] granting motion to substitute party or change name [1334692-2] PSEG Fossil LLC in 11-1302 substituted by Public Service Enterprise Group, Inc. in 11-1302. The Clerk is directed to amend the docket to reflect the same. [11-1302]
10/12/11	CLERK'S ORDER filed [1334919] consolidating cases 11-1368, 11-1369, 11-1378, 11-1379, 11-1388, 11-1389 (Consolidation started 10/12/2011) with 11-1302; directing party to file in 11-1368, 11-1369, 11-1378, 11-1379, 11-1388, 11-1389 initial submissions: PETITIONER docketing statement due 11/14/2011. PETITIONER statement of issues due 11/14/

DATE	PROCEEDINGS
	2011 [11-1302, 11-1368, 11-1369, 11-1378, 11-1379, 11-1388, 11-1389]
10/12/11	*UNOPPOSED* MOTION filed [1334991] by EPA in 11-1302 to extend time to file response to 10/31/2011. [Service Date: 10/12/2011] Pages: 1-10. [11-1302, 11-1329] (Gualtieri, David)
10/13/11	*UNOPPOSED* MOTION filed [1335081] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1375 to extend time to file response to 10/27/2011. [Service Date: 10/13/2011] Pages: 1-10. [11-1302, 11-1375] (Lipshultz, Jon)
10/13/11	RESPONSE IN OPPOSITION FILED [1335231] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to motion to stay case [1331348-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-

DATE	PROCEEDINGS
	1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
10/13/11	MODIFIED EVENT FROM LODGED TO FILED—RESPONSE IN OPPOSITION FILED [1335282] to motion for other relief [1331220-2] (Reply to Response by Mail and Response to Cross Motion due on 10/27/2011) combined with a MOTION FILED by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1338 to dismiss case for lack of standing [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1338]—[Edited 10/17/2011 by HTS] (Lipshultz, Jon)
10/13/11	*JOINT* RESPONSE IN OPPOSITION FILED [1335314] by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. to motion for other relief [1331220-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 11-15. [11-1302] (Rubin, James)
10/13/11	*JOINT* RESPONSE IN OPPOSITION FILED [1335315] by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. in 11-1302 to motion to

DATE	PROCEEDINGS
	stay case [1331348-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 11-15. [11-1340, 11-1302] (Rubin, James)
10/13/11	RESPONSE IN OPPOSITION FILED [1335316] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion for other relief [1331220-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1338] (Hays, George)
10/13/11	RESPONSE IN OPPOSITION FILED [1335317] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion to stay case [1331348-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1340] (Donahue, Sean)
10/13/11	REPLY FILED [1335318] by GenOn Energy, Inc. in 11-1323 to response [1334050-2] [Service Date: 10/13/2011 by CM/ECF NDA] Pages: 1-10. [11-1323] (Holmstead, Jeffrey)
10/14/11	MOTION filed [1335573] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. to stay underlying order in case (Response to Motion served by mail due on 10/27/2011) [Service Date: 10/

DATE	PROCEEDINGS
	14/2011 by CM/ECF NDA] Pages: 16-20. [11-1373] (Manning, Robert)
10/14/11	ENTRY OF APPEARANCE filed [1335574] by Norman L. Rave and co-counsel Jessica O'Donnell on behalf of Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, Respondent Lisa Perez Jackson in 11-1394, 11-1395. [11-1302, 11-1315, 11-1323, 11-1329 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (O'Donnell, Jessica)
10/14/11	MOTION filed [1335586] by Municipal Electric Authority of Georgia in 11-1379 to stay underlying order in case (Response to Motion served by mail due on 10/27/2011) [Service

DATE	PROCEEDINGS
	Date: 10/14/2011 by CM/ECF NDA] Pages: 21-30. [11-1379] (Cloud, Douglas)
10/14/11	STATEMENT OF ISSUES FILED [1335597] by GenOn Energy, Inc. in 11-1323 [Service Date: 10/14/2011] [11-1323] (Holmstead, Jeffrey)
10/14/11	DOCKETING STATEMENT FILED [1335600] by GenOn Energy, Inc. in 11-1323 [Service Date: 10/14/2011] [11-1323] (Holmstead, Jeffrey)
10/17/11	*UNOPPOSED* MOTION filed [1335916] by EPA in 11-1302, 11-1364 to extend time to file response to 11/07/2011. [Service Date: 10/17/2011] Pages: 1-10. [11-1302, 11-1364] (O'Donnell, Jessica)
10/17/11	*CORRECTED* STATEMENT FILED [1336020] by National Rural Electric Cooperative Association with Disclosure Listing [Service Date: 10/17/2011] [11-1381] (Wehrum, William)
10/17/11	REPLY FILED [1336040] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow

DATE	PROCEEDINGS
	Power Company, LLC to response [1334068-2], [1334066-2], [1334065-2], [1333987-2] [Service Date: 10/17/2011 by CM/ECF NDA] Pages: 16-20. [11-1315] (Keisler, Peter)
10/19/11	CLERK'S ORDER filed [1336403] granting motion to extend time [1330711-2] in 11-1302, 11-1315, 11-1323, granting motion to extend time [1331421-2] in 11-1302, granting motion to extend time [1331426-2] in 11-1302, granting motion to extend time [1331499-2] in 11-1302; The Clerk is directed to file response [1333987-2] in 11-1302, 11-1315, The Clerk is directed to file response [1334050-2] in 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, The Clerk is directed to file response [1334065-2] in 11-1302, 11-1315, The Clerk is directed to file response [1334066-2] in 11-1302, 11-1315, 11-1323 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]

DATE	PROCEEDINGS
10/19/11	PER ABOVE ORDER lodged response [1333987-2], response [1334050-2], response [1334064-2], response [1334065-2], response [1334066-2] is filed [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
10/19/11	MODIFIED PARTY FILERS—MOTION filed [1336419] by States of Connecticut, Delaware, Maryland, Rhode Island, and Vermont, the Commonwealth of Massachusetts, and the District of Columbia for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 10/19/2011] [11-1329]—[Edited 10/19/2011 by KRM] (Levine, Matthew)
10/19/11	CLERK'S ORDER filed [1336425] granting motion to extend time [1331311-2] in 11-1302, 11-1338, granting motion to extend time [1332175-2] in 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, granting motion to extend time [1332609-2] in 11-1302, 11-1338, granting motion to extend time [1332804-2] in 11-1302, granting motion to ex-

DATE	PROCEEDINGS
	tend time [1332836-2] in 11-1302 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
10/19/11	MOTION filed [1336636] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1373, 11-1379 to extend time to file response to 12/01/2011. (Response to Motion served by mail due on 11/03/2011) [Service Date: 10/19/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1373, 11-1379] (Lipshultz, Jon)
10/19/11	MOTION filed [1336648] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to extend time to file initial submissions to 11/14/2011. (Response to Motion served by mail due on 11/03/2011)

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	[Service Date: 10/19/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
10/19/11	MOTION filed [1336655] by State of New York in 11-1302, 11-1388, 11-1395 for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 10/19/2011] [11-1302, 11-1388, 11-1395]—[Edited 10/20/2011 by LMF] (Frank, Andrew)
10/19/11	MODIFIED EVENT FROM FILED TO LODGED—MOTION filed [1336664] by Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont to extend time to file motion to 10/31/2011. (Response to Motion served by mail due on 11/03/2011) [Service Date: 10/19/2011 by CM/ECF NDA] Pages: 1-10. [11-1329]—[Edited 10/20/2011 by LMF] (Raivel, Mary)

DATE	PROCEEDINGS
10/20/11	RELIEF ADDED—AMENDED motion to extend time [1336808] filed by Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont extend time to file response [Service Date: 10/19/2011] Pages: 1-10. [11-1329] —[Edited 10/20/2011 by HTS] (Raivel, Mary)
10/20/11	RESPONSE IN OPPOSITION FILED [1336859] by Wisconsin Electric Power Company in 11-1363 [Service Date: 10/20/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1363] (Splitek, Matthew)
10/20/11	MOTION filed [1336874] by San Miguel Electric Cooperative, Inc. for leave to intervene [Disclosure Listing: Attached] [Service Date: 10/20/2011] [11-1302] (Cohan, Robert)
10/21/11	RESPONSE IN OPPOSITION FILED [1337031] by Municipal Electric Authority of Georgia in 11-1379 to motion to extend time [1336636-2] [Service Date: 10/21/2011 by CM/ECF NDA] Pages: 1-10. [11-1379] (Zygmont, Christopher)
10/21/11	MOTION filed [1337158] by Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374 to stay underlying order in case (Response to Motion served by mail due on 11/03/

DATE	PROCEEDINGS
	2011) [Service Date: 10/21/2011 by Email] Pages: 16-20. [11-1374, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Zosa, Marie)
10/21/11	RESPONSE IN OPPOSITION FILED [1337169] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. to motion to extend time [1336636-2] [Service Date: 10/21/2011 by CM/ECF NDA] Pages: 1-10. [11-1373] (Manning, Robert)
10/21/11	RESPONSE IN OPPOSITION FILED [1337172] by EME Homer City Generation, L.P. to motion to extend time [1336636-2] [Service Date: 10/21/2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Garre, Gregory)
10/24/11	MOTION filed [1337266] by City of Ames, Iowa in 11-1378 to stay underlying order in case (Response to Motion served by mail due on 11/07/2011) [Service Date: 10/24/2011 by

DATE	PROCEEDINGS
	CM/ECF NDA, US Mail] Pages: 21-30. [11-1378, 11-1302] (Ritts, Leslie)
10/24/11	SUPPLEMENT [1337338] to motion for other relief [1333691-2] filed by State of Michigan in 11-1386 [11-1386, 11-1329] (Gordon, Neil)
10/24/11	DOCKETING STATEMENT FILED [1337348] by State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340 [Service Date: 10/24/2011] [11-1302, 11-1340] (Spohn, Katherine)
10/24/11	STATEMENT OF ISSUES FILED [1337349] by State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340 [Service Date: 10/24/2011] [11-1302, 11-1340] (Spohn, Katherine)
10/24/11	DOCKETING STATEMENT FILED [1337351] by Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 [Service Date: 10/24/2011] [11-1338, 11-1302] (Davis, Bill)

DATE	PROCEEDINGS
10/24/11	STATEMENT OF ISSUES FILED [1337354] by Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 [Service Date: 10/24/2011] [11-1338, 11-1302] (Davis, Bill)
10/24/11	REPLY FILED [1337356] by State of Florida and State of Nebraska in 11-1340 to response [1335231-2] [Service Date: 10/24/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1340] (Spohn, Katherine)
10/24/11	*AMENDED* DOCKETING STATEMENT FILED [1337359] by Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 [Service Date: 10/24/2011] [11-1338, 11-1302] (Davis, Bill)
10/24/11	CERTIFICATE OF SERVICE [1337379] to motion for leave to intervene. [1336419-2] filed by State of Connecticut. [11-1329] (Levine, Matthew)
10/24/11	*JOINT* RESPONSE IN OPPOSITION FILED [1337403] by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. to motion for other relief [1332841-2] [Service Date: 10/24/2011 by

DATE	PROCEEDINGS
	CM/ECF NDA] Pages: 1-10. [11-1302] (Rubin, James)
10/24/11	MODIFIED PARTY FILER—MOTION filed [1337408] by City of Philadelphia for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 10/24/2011] [11-1392, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1393, 11-1394, 11-1395]—[Edited 10/25/2011 by LMC] (Schwarz, Scott)
10/24/11	MOTION filed [1337415] by State of Wisconsin in 11-1393 For Stay of Final Rule. (Response to Motion served by mail due on 11/07/2011) [Service Date: 10/24/2011 by CM/ECF NDA, Email] Pages: 16-20. [11-1393, 11-1302] (Dawson, Thomas)
10/24/11	RESPONSE IN OPPOSITION FILED [1337434] by EPA and Lisa Perez Jackson in 11-1350 to motion for other relief [1332841-2] [Service Date: 10/24/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1350] (Gualtieri, David)

DATE	PROCEEDINGS
10/24/11	DOCKETING STATEMENT FILED [1337437] by State of Kansas [Service Date: 10/24/2011] [11-1329] (Nickel, Henry)
10/24/11	STATEMENT OF ISSUES FILED [1337438] by State of Kansas [Service Date: 10/24/2011] [11-1329] (Nickel, Henry)
10/24/11	MOTION filed [1337439] by Dairyland Power Cooperative in 11-1394 Partial Stay of Final Rule. (Response to Motion served by mail due on 11/07/2011) [Service Date: 10/24/2011 by CM/ECF NDA] Pages: 16-20. [11-1394, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1395] (Landsman, Jeffrey)
10/24/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1337440] by Dairyland Power Cooperative in 11-1394 [Service Date: 10/24/2011] [11-1394, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369,

DATE	PROCEEDINGS
	11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1395] (Landsman, Jeffrey)
10/24/11	RESPONSE IN OPPOSITION FILED [1337444] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315 to motion to extend time [1336636-2] [Service Date: 10/24/2011 by CM/ECF NDA] Pages: 1-10. [11-1315] (Keisler, Peter)
10/24/11	RESPONSE IN OPPOSITION FILED [1337447] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion for other relief [1332841-2] [Service Date: 10/24/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1350] (Donahue, Sean)
10/26/11	STATEMENT OF ISSUES FILED [1338009] by San Miguel Electric Cooperative

DATE	PROCEEDINGS
	[Service Date: 10/26/2011] [11-1302] (Cohan, Robert)
10/26/11	CERTIFICATE OF SERVICE [1338018] to motion for leave to intervene. [1336874-2] filed by San Miguel Electric Cooperative in 11-1302. [11-1302, 11-1338] (Cohan, Robert)
10/26/11	MOTION filed [1338085] by Entergy Corporation in 11-1360 Motion for Partial Stay of Final Rule. (Response to Motion served by mail due on 11/10/2011) [Service Date: 10/26/2011 by 3rd Party, US Mail, CM/ECF NDA] Pages: 21-30. [11-1360, 11-1302] (Berge, Megan)
10/26/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1338086] by Entergy Corporation in 11-1360 [Service Date: 10/26/2011] [11-1360, 11-1302] (Berge, Megan)
10/26/11	FIRST CLASS MAIL RETURNED [1338545] marked "Return to Sender; Not Deliverable as Addressed; Unable to Forward". Order notifying party of consolidation had been sent to Attorney Mr. Karl Roy Moor for Petitioner Southern Company Services, Inc. in 11-1389. [11-1302, 11-1389]

DATE	PROCEEDINGS
10/27/11	CERTIFICATE OF SERVICE [1338302] to motion for other relief [1338085-2] filed by Entergy Corporation in 11-1360. [11-1360, 11-1302] (Berge, Megan)
10/27/11	REPLY FILED [1338311] by Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 to Response and RESPONSE FILED to Cross Motion [1335282-2], [1335282-3](Reply to Response by Mail to Cross Motion due on 11/07/2011) [Service Date: 10/27/2011 by US Mail, CM/ECF NDA] Pages: 11-15. [11-1338, 11-1302] (Davis, Bill)
10/27/11	RESPONSE IN OPPOSITION FILED [1338382] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1375 to motion for other relief [1334350-2] [Service Date: 10/27/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1375] (Lipshultz, Jon)
10/27/11	*JOINT* RESPONSE IN OPPOSITION FILED [1338385] by Calpine Corporation and Exelon Corporation in 11-1302 to motion for other relief [1338085-2], motion for other relief [1337439-2], motion for other relief [1337415-2], motion to stay case [1337266-2], motion to stay case [1337158-2], motion to stay case [1335586-2], motion to stay case

DATE	PROCEEDINGS
	[1335573-2], motion to stay case [1334498-2], motion for other relief [1334350-2], motion for other relief [1333691-2] [Service Date: 10/27/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1329, 11-1360, 11-1364, 11-1373, 11-1374, 11-1375, 11-1378, 11-1379, 11-1386, 11-1393, 11-1394] (Rubin, James)
10/27/11	MOTION filed [1338388] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1373, 11-1374, 11-1378, 11-1379, 11-1393, 11-1394 to extend time to file response to 12/01/2011. (Response to Motion served by mail due on 11/10/2011), Leave to File a Consolidated Response. (Response to Motion served by mail due on 11/10/2011) [Service Date: 10/27/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1373, 11-1374, 11-1378, 11-1379, 11-1393, 11-1394] (Lipshultz, Jon)
10/27/11	DOCKETING STATEMENT FILED [1338393] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC [Service Date: 10/27/2011] [11-1315] (Keisler, Peter)

DATE	PROCEEDINGS
10/27/11	STATEMENT OF ISSUES FILED [1338394] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC [Service Date: 10/27/2011] [11-1315] (Keisler, Peter)
10/27/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1338396] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC [Service Date: 10/27/2011] [11-1315] (Keisler, Peter)
10/27/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1338399] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Com-

DATE	PROCEEDINGS
	pany, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC [Service Date: 10/27/2011] Intent: Appx Deferred [11-1315] (Keisler, Peter)
10/27/11	RESPONSE IN OPPOSITION FILED [1338400] by State of Ohio in 11-1392 [Service Date: 10/27/2011 by CM/ECF NDA] Pages: 1-10. [11-1392, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1393, 11-1394, 11-1395] (Vitale, Dale)
10/27/11	UNDERLYING DECISION IN CASE submitted [1338401] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC [Service Date: 10/27/2011] [11-1315] (Keisler, Peter)

DATE	PROCEEDINGS
10/27/11	RESPONSE IN OPPOSITION FILED [1338428] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion for other relief [1334350-2] [Service Date: 10/27/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1375] (Hays, George)
10/28/11	DOCKETING STATEMENT FILED [1338599] by Wisconsin Public Service Corporation in 11-1350 [Service Date: 10/28/2011] [11-1350, 11-1302] (German, Julia)
10/28/11	STATEMENT OF ISSUES FILED [1338600] by Wisconsin Public Service Corporation in 11-1350 [Service Date: 10/28/2011] [11-1350, 11-1302] (German, Julia)
10/28/11	CERTIFICATE OF SERVICE [1338660] to motion for other relief [1337439-2] filed by Dairyland Power Cooperative in 11-1394. [11-1394, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1395] (Landsman, Jeffrey)

DATE	PROCEEDINGS
10/28/11	RESPONSE IN SUPPORT FILED [1338754] by Utility Air Regulatory Group in 11-1358 to motion for other relief [1333691-2], motion to stay case [1334498-2] [Service Date: 10/28/2011 by CM/ECF NDA] Pages: 11-15. [11-1302, 11-1329, 11-1358, 11-1364] (Fichthorn, Norman)
10/31/11	RESPONSE IN OPPOSITION FILED [1339022] by EPA in 11-1302 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 16-20. [11-1329, 11-1302] (Gualtieri, David)
10/31/11	RESPONSE IN OPPOSITION FILED [1339030] by Entergy Corporation in 11-1360 to motion to extend time [1338388-2], motion for other relief [1338388-3] [Service Date: 10/31/2011 by US Mail, 3rd Party, CM/ECF NDA] Pages: 1-10. [11-1302, 11-1360] (Berge, Megan)
10/31/11	MODIFIED PARTY FILER—MOTION filed [1339032] by Putnam, County Georgia to participate as amicus curiae. [Disclosure Listing: Not Applicable to this Party] [Service Date: 10/31/2011] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-

DATE	PROCEEDINGS
	1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 10/31/2011 by LMC] (Henderson, Douglas)
10/31/11	RESPONSE IN SUPPORT FILED [1339038] by State of Georgia in 11-1367 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 1-10. [11-1367, 11-1302, 11-1329] (Nickel, Henry)
10/31/11	RESPONSE IN SUPPORT FILED [1339054] by City of Springfield, Illinois, Office of Public Utilities in 11-1368, State of Alabama in 11-1340, Mississippi Public Service Commission in 11-1386 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 11-15. [11-1368, 11-1302, 11-1329, 11-1340, 11-1386] (Nickel, Henry)
10/31/11	INCORRECT DOCKET ENTRY-DISREGARD—MOTION filed [1339057] by Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont Opposition to Kansas Motion for Stay. (Response to Motion served by mail due on 11/14/2011) [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 21-30. [11-

DATE	PROCEEDINGS
	1329]—[Edited 11/01/2011 by LMC] (Raivel, Mary)
10/31/11	MODIFIED EVENT—RESPONSE IN OPPOSITION FILED [1339060] filed by Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont to motion to stay case [1337158-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 16-20. [11-1329]—[Edited 11/01/2011 by LMC] (Raivel, Mary)
10/31/11	RESPONSE IN SUPPORT FILED [1339073] by Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 16-20. [11-1389, 11-1302, 11-1329, 11-1340, 11-1367, 11-1386] (Campbell, Margaret)
10/31/11	RESPONSE IN SUPPORT FILED [1339074] by Putnam County, Georgia in 11-1329 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1329, 11-1367] (Henderson, Douglas)
10/31/11	RESPONSE IN OPPOSITION FILED [1339081] by American Lung Association,

DATE	PROCEEDINGS
	Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion for other relief [1333691-2] [Service Date: 10/31/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1329] (Hays, George)
11/1/11	CLERK'S ORDER filed [1339090] granting motion to extend time [1333633-2] in 11-1302, granting motion to extend time [1334238-2] in 11-1302, granting motion to extend time [1334353-2] in 11-1302, 11-1350, granting motion to extend time [1334166-2] in 11-1302, 11-1350, granting motion to extend time [1334284-2] in 11-1302, 11-1350, granting motion to extend time [1334991-2] in 11-1302, 11-1329, granting motion to extend time [1335081-2] in 11-1302, 11-1375, granting motion to extend time [1336808-3] in 11-1329. The responses submitted on 10/24/2011. 10/27/2011, and 10/31/2011, are deemed timely filed. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]

DATE	PROCEEDINGS
11/1/11	ENTRY OF APPEARANCE filed [1339190] by George E. Hays on behalf of Intervenor for Respondent Sierra Club. [11-1302] (Hays, George)
11/1/11	RESPONSE IN OPPOSITION FILED [1339239] by EME Homer City Generation, L.P. in 11-1302 to motion to extend time [1338388-2], motion for other relief [1338388-3] [Service Date: 11/01/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1373, 11-1374, 11-1378, 11-1379, 11-1393, 11-1394] (Garre, Gregory)
11/1/11	INCORRECT DOCKET ENTRY-DISREGARD—MOTION filed [1339373] by Wisconsin Electric Power Company in 11-1363 Partial Stay of Final Rule. (Response to Motion served by mail due on 11/17/2011) [Service Date: 11/01/2011 by CM/ECF NDA] Pages: 16-20. [11-1363, 11-1302]—[Edited 11/02/2011 by LMC] (Splitek, Matthew)
11/1/11	MOTION filed [1339374] by Wisconsin Electric Power Company in 11-1363 Partial Stay of Final Rule. (Response to Motion served by mail due on 11/17/2011) [Service Date: 11/01/2011 by CM/ECF NDA] Pages: 16-20. [11-1363, 11-1302] (Splitek, Matthew)
11/2/11	RESPONSE IN OPPOSITION FILED [1339509] by Environmental Committee of the Florida Electric Power Coordinating

DATE	PROCEEDINGS
	Group, Inc. in 11-1373 to motion to extend time [1338388-2], motion for other relief [1338388-3] [Service Date: 11/01/2011 by CM/ECF NDA] Pages: 1-10. [11-1373, 11-1302, 11-1374, 11-1378, 11-1379, 11-1393, 11-1394] (Manning, Robert)
11/2/11	*UNOPPOSED* MOTION filed [1339586] by Municipal Electric Authority of Georgia in 11-1379 to extend time to file reply [Service Date: 11/02/2011] Pages: 1-10. [11-1379, 11-1302] (Meezan, David)
11/2/11	RESPONSE IN OPPOSITION FILED [1339589] by State of Kansas in 11-1329 to motion for leave to intervene. [1336419-2] [Service Date: 11/02/2011 by CM/ECF NDA] Pages: 1-10. [11-1329, 11-1302] (Nickel, Henry)
11/2/11	RESPONSE IN OPPOSITION FILED [1339626] by Kansas City Board of Public Utilities to motion to extend time [1338388-2], motion for other relief [1338388-3] [Service Date: 11/02/2011 by CM/ECF NDA] Pages: 1-10. [11-1374] (Zosa, Marie)
11/2/11	DOCKETING STATEMENT FILED [1339632] by National Mining Association [Service Date: 11/02/2011] [11-1357] (Collier, Tameka)

DATE	PROCEEDINGS
11/2/11	STATEMENT OF ISSUES FILED [1339634] by National Mining Association [Service Date: 11/02/2011] [11-1357] (Collier, Tameka)
11/2/11	STATEMENT FILED [1339637] by National Mining Association concerning appendix deferral [Service Date: 11/02/2011] [11-1357] (Collier, Tameka)
11/3/11	MODIFIED PARTY FILER—MOTION filed [1339820] by State of North Carolina for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/03/2011] [11-1302]—[Edited 11/03/2011 by HTS] (Bernstein, Marc)
11/3/11	MODIFIED EVENT—REPLY FILED [1339855] filed by Wisconsin Public Service Corporation in 11-1350 to response [1337434-2]. [Service Date: 11/03/2011 by CM/ECF NDA] Pages: 11-15. [11-1350, 11-1302]—[Edited 11/03/2011 by AY] (German, Julia)
11/4/11	DOCKETING STATEMENT FILED [1340045] by American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. [Service Date: 11/04/2011] [11-1359] (Broadbent, Gary)

DATE	PROCEEDINGS
11/4/11	STATEMENT OF ISSUES FILED [1340048] by American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. [Service Date: 11/04/2011] [11-1359] (Broadbent, Gary)
11/4/11	MOTION filed [1340062] by EPA in 11-1302, 11-1329, EPA and Lisa Perez Jackson in 11-1360, 11-1363, 11-1364 to strike the motion (Response to Motion served by mail due on 11/17/2011), to extend time to file response to 12/15/2011. (Response to Motion served by mail due on 11/17/2011), Leave to file an 85 page consolidated response if motion to strike is not granted. (Response to Motion served by mail due on 11/17/2011) [Service Date: 11/04/2011 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1329, 11-1360, 11-1363, 11-1364] (Lipshultz, Jon)
11/4/11	MOTION filed [1340077] by The City of New York for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/04/2011] [11-1392, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-

DATE	PROCEEDINGS
	1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1393, 11-1394, 11-1395] (King, Christopher)
11/4/11	*UNOPPOSED* MOTION filed [1340107] by Southwestern Public Service Company to exceed page limits in reply [Service Date: 11/04/2011] Pages: 1-10. [11-1375] (Frank, Joshua)
11/4/11	ENTRY OF APPEARANCE filed [1340126] by David M. Flannery and co-counsel Gale Lea Rubrecht on behalf of Petitioner Midwest Ozone Group in 11-1362. [11-1362, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rubrecht, Gale Lea)
11/4/11	DOCKETING STATEMENT FILED [1340179] by Utility Air Regulatory Group [Service Date: 11/04/2011] [11-1358] (Fichthorn, Norman)
11/4/11	STATEMENT OF ISSUES FILED [1340180] by Utility Air Regulatory Group

DATE	PROCEEDINGS
	[Service Date: 11/04/2011] [11-1358] (Fichthorn, Norman)
11/7/11	DOCKETING STATEMENT FILED [1340411] by United Mine Workers of America in 11-1371 [Service Date: 11/07/2011] [11-1371, 11-1302] (Traynor, Arthur)
11/7/11	STATEMENT OF ISSUES FILED [1340412] by United Mine Workers of America in 11-1371 [Service Date: 11/07/2011] [11-1371, 11-1302] (Traynor, Arthur)
11/7/11	MOTION filed [1340452] by CITY OF CHICAGO for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/07/2011] [11-1392] (Solomon, Benna)
11/7/11	MODIFIED PARTY FILER—MOTION filed [1340460] by Mayor and City Council of Baltimore for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/07/2011] [11-1392, 11-1302]—[Edited 11/09/2011 by HTS] (Phelan, William)
11/7/11	DOCKETING STATEMENT FILED [1340470] by Entergy Corporation in 11-1360 [Service Date: 11/07/2011] [11-1360, 11-1302] (Berge, Megan)
11/7/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1340471] by Entergy Corporation in 11-1360 [Service

DATE	PROCEEDINGS
	Date: 11/07/2011] Intent: AppxDeferred [11-1360, 11-1302] (Berge, Megan)
11/7/11	STATEMENT OF ISSUES FILED [1340472] by Entergy Corporation in 11-1360 [Service Date: 11/07/2011] [11-1360, 11-1302] (Berge, Megan)
11/7/11	MOTION filed [1340478] by State of Illinois for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/07/2011] [11-1378, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Karr, Gerald)
11/7/11	RESPONSE IN SUPPORT FILED [1340481] by AEP Texas North Company in 11-1369 to motion to stay case [1334498-2] [Service Date: 11/07/2011 by CM/ECF NDA] Pages: 11-15. [11-1364, 11-1369] (Henry, Janet)
11/7/11	RESPONSE IN OPPOSITION FILED [1340488] by EPA in 11-1302, 11-1364 to motion to stay case [1334498-2] [Service Date:

DATE	PROCEEDINGS
	11/07/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1364] (O'Donnell, Jessica)
11/7/11	INCORRECT DOCKET ENTRY-DISREGARD—they will refile in 14 point font in 11-1302 *UNOPPOSED* MOTION filed [1340493] by City of Bridgeport, Connecticut for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/07/2011] [11-1392, 11-1393, 11-1394, 11-1395]—[Edited 11/10/2011 by HTS] (Dougherty, James)
11/7/11	INCORRECT DOCKET ENTRY-DISREGARD—MOTION filed [1340505] by State of Ohio in 11-1392 Stay Appicability of Final Rule. (Response to Motion served by mail due on 11/21/2011) [Service Date: 11/07/2011 by CM/ECF NDA] Pages: 21-30. [11-1392]—[Edited 11/08/2011 by LMF] (Vitale, Dale)
11/7/11	REPLY FILED [1340508] by Southwestern Public Service Company to response [1338382-2], [1338385-2], [1338428-2] [Service Date: 11/07/2011 by CM/ECF NDA] Pages: 11-15. [11-1375] (Frank, Joshua)
11/7/11	RESPONSE IN OPPOSITION FILED [1340509] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion to stay

DATE	PROCEEDINGS
	case [1334498-2] [Service Date: 11/07/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1364] (Donahue, Sean)
11/8/11	INCORRECT DOCKET ENTRY-DISREGARD—*CORRECTED* (SECOND CORRECTED MOTION FILED ON 11/10/11) MOTION filed [1340572] by City of Bridgeport, CT for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/08/2011] [11-1392, 11-1302]—[Edited 11/14/2011 by HTS] (Dougherty, James)
11/8/11	DOCKETING STATEMENT FILED [1340636] by State of Wisconsin in 11-1393 [Service Date: 11/08/2011] [11-1393, 11-1302] (Dawson, Thomas)
11/8/11	STATEMENT OF ISSUES FILED [1340637] by State of Wisconsin in 11-1393 [Service Date: 11/08/2011] [11-1393, 11-1302] (Dawson, Thomas)
11/8/11	LETTER FILED [1340722] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1338 pursuant to FRAP 28j advising of additional authorities [Service Date: 11/08/2011] [11-1302, 11-1315, 11-1338] (Lipshultz, Jon)
11/8/11	ENTRY OF APPEARANCE filed [1340729] by Henry V. Nickel and co-counsel George P.

DATE	PROCEEDINGS
	Sibley III on behalf of Petitioner State of Kansas. [11-1329] (Sibley, George)
11/9/11	DOCKETING STATEMENT FILED [1340899] by Municipal Electric Authority of Georgia in 11-1379 [Service Date: 11/09/2011] [11-1379, 11-1302] (Meezan, David)
11/9/11	STATEMENT OF ISSUES FILED [1340903] by Municipal Electric Authority of Georgia in 11-1379 [Service Date: 11/09/2011] [11-1379, 11-1302] (Meezan, David)
11/9/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1340908] by Municipal Electric Authority of Georgia in 11-1379 [Service Date: 11/09/2011] Intent: AppxDeferred [11-1379, 11-1302] (Meezan, David)
11/9/11	RESPONSE IN OPPOSITION FILED [1340929] by Entergy Corporation in 11-1360 to motion to strike document [1340062-2], motion to extend time [1340062-3], motion for other relief [1340062-4] [Service Date: 11/09/2011 by CM/ECF NDA] Pages: 1-10. [11-1360, 11-1302, 11-1329, 11-1363, 11-1364] (Frank, Joshua)
11/9/11	*JOINT* ENTRY OF APPEARANCE filed [1340972] by Henry V. Nckel and co-counsel Jeffrey A. Chanay on behalf of Petitioner State of Kansas. [11-1329] (Chanay, Jeffrey)

DATE	PROCEEDINGS
11/9/11	ENTRY OF APPEARANCE filed [1340973] by Henry V. Nickel and co-counsel George P. Sibley, III on behalf of Petitioner City of Springfield, Illinois, Office of Public Utilities. [11-1368] (Sibley, George)
11/9/11	RESPONSE IN OPPOSITION FILED [1340975] by Dairyland Power Cooperative in 11-1394 to motion to extend time [1338388-2], motion for other relief [1338388-3] [Service Date: 11/09/2011 by CM/ECF NDA, US Mail] Pages: 1-10. [11-1394, 11-1302] (Landsman, Jeffrey)
11/10/11	DOCKETING STATEMENT FILED [1341084] by Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 11/10/2011] [11-1395] (Alessi, Robert)
11/10/11	STATEMENT OF ISSUES FILED [1341085] by Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 11/10/2011] [11-1395] (Alessi, Robert)
11/10/11	MODIFIED PARTY FILER—*SECOND CORRECTED* MOTION filed [1341137] by City of Bridgeport, CT for leave to intervene [Disclosure Listing: Not Applicable to this Party] [Service Date: 11/10/2011] [11-1392, 11-1302]—[Edited 11/14/2011 by HTS] (Dougherty, James)

DATE	PROCEEDINGS
11/10/11	STATEMENT OF ISSUES FILED [1341194] by Midwest Ozone Group [Service Date: 11/10/2011] [11-1362] (Rubrecht, Gale Lea)
11/10/11	DOCKETING STATEMENT FILED [1341195] by Midwest Ozone Group [Service Date: 11/10/2011] [11-1362] (Rubrecht, Gale Lea)
11/10/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341196] by Midwest Ozone Group [Service Date: 11/10/2011] Intent: AppxDeferred [11-1362] (Rubrecht, Gale Lea)
11/10/11	STATEMENT OF ISSUES FILED [1341219] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373 [Service Date: 11/10/2011] [11-1373] (Manning, Robert)
11/10/11	DOCKETING STATEMENT FILED [1341221] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373 [Service Date: 11/10/2011] [11-1373] (Manning, Robert)
11/10/11	REPLY FILED [1341240] by State of Kansas in 11-1329 to response [1339022-2], [1339081-2], [1339060-3] [Service Date: 11/10/2011 by CM/ECF NDA] Pages: 11-15. [11-1329] (Nickel, Henry)

DATE	PROCEEDINGS
11/10/11	*AMENDED* CERTIFICATE OF SERVICE [1341252] to statement [1341195-2], statement [1341194-2], statement [1341196-2] filed by Midwest Ozone Group. [11-1362] (Rubrecht, Gale Lea)
11/10/11	CERTIFICATE OF SERVICE [1341265] to notice [1340126-2] filed by Midwest Ozone Group. [11-1362] (Rubrecht, Gale Lea)
11/11/11	NOTICE FILED [1341298] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC to withdraw attorney Rachel Dougan Gray who represented Sandow Power Company, LLC, Oak Grove Management Company, LLC, Luminant Mining Company, LLC, Luminant Holding Company, LLC, Luminant Generation Company, LLC, Luminant Energy Comopany, LLC, Luminant Big Brown Mining Company, LLC, Big Brown Paper Company, LLC and Big Brown Lignite Company, LLC in 11-1315 [Service Date: 11/11/2011] [11-1315] (Gray, Rachel)
11/13/11	RESPONSE FILED [1341316] by Big Brown Lignite Company, LLC, Big Brown Paper

DATE	PROCEEDINGS
	Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC to letter Rule 28j authorities [1340722-2], letter [1340722-3] [Service Date: 11/13/2011 by CM/ECF NDA] Pages: 1-10. [11-1315] (Keisler, Peter)
11/14/11	DOCKETING STATEMENT FILED [1341378] by State of Michigan [Service Date: 11/14/2011] [11-1386] (Gordon, Neil)
11/14/11	STATEMENT OF ISSUES FILED [1341381] by State of Michigan [Service Date: 11/14/2011] [11-1386] (Gordon, Neil)
11/14/11	PER CURIAM ORDER filed [1341383] ORDERED that the motion to extend time to file initial submissions, except stay motions, be granted in part and denied in part. Respondent's request to extend the initial submissions deadline to November 14, 2011, and the deadline for the submission of dispositive motions and the certified index to the record to December 5, 2011, is granted. Respondent's request to set the deadline to file stay motions at October 24, 2011, is denied. It is FURTHER ORDERED, on the court's own motion, that no additional stay motions may

DATE	PROCEEDINGS
	be filed in these cases without leave of court. It is FURTHER ORDERED that the motion to strike be denied. FURTHER ORDERED that the following format and schedule apply to the briefing of stay motions in these cases: Consolidated response of respondent to motions to stay (not to exceed 75 pages) 12/1/11. Response(s) of intervenors supporting respondent to motions to stay (not to exceed a combined total of 35 pages, allocated as intervenors see fit) 12/1/11. Replies in support of motions to stay (not to exceed a combined total of 50 pages, allocated as stay movants see fit) 12/9/11. Before Judges: Garland, Brown and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 11/14/2011 by TAG]
11/14/11	DOCKETING STATEMENT FILED [1341409] by Sunbury Generation LP in 11-1382 [Service Date: 11/14/2011] [11-1382] (Vaccaro, Katherine)

DATE	PROCEEDINGS
11/14/11	STATEMENT OF ISSUES FILED [1341410] by Sunbury Generation LP in 11-1382 [Service Date: 11/14/2011] [11-1382] (Vaccaro, Katherine)
11/14/11	DOCKETING STATEMENT FILED [1341415] by ARIPPA in 11-1383 [Service Date: 11/14/2011] [11-1383] (Vaccaro, Katherine)
11/14/11	STATEMENT OF ISSUES FILED [1341416] by ARIPPA in 11-1383 [Service Date: 11/14/2011] [11-1383] (Vaccaro, Katherine)
11/14/11	DOCKETING STATEMENT FILED [1341422] by Dairyland Power Cooperative in 11-1394 [Service Date: 11/14/2011] [11-1394] (Landsman, Jeffrey)
11/14/11	STATEMENT OF ISSUES FILED [1341424] by Dairyland Power Cooperative in 11-1394 [Service Date: 11/14/2011] [11-1394] (Landsman, Jeffrey)
11/14/11	DOCKETING STATEMENT FILED [1341469] by DTE Stoneman, LLC [Service Date: 11/14/2011] [11-1391] (Murdock, Eric)
11/14/11	STATEMENT OF ISSUES FILED [1341471] by DTE Stoneman, LLC [Service Date: 11/14/2011] [11-1391] (Murdock, Eric)
11/14/11	DOCKETING STATEMENT FILED [1341475] by Midwest Food Processors Asso-

DATE	PROCEEDINGS
	ciation, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. [Service Date: 11/14/2011] [11-1377] (Palmer, Todd)
11/14/11	STATEMENT OF ISSUES FILED [1341477] by Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. [Service Date: 11/14/2011] [11-1377] (Palmer, Todd)
11/14/11	DOCKETING STATEMENT FILED [1341480] by National Rural Electric Cooperative Association [Service Date: 11/14/2011] [11-1381] (Wehrum, William)
11/14/11	STATEMENT OF ISSUES FILED [1341481] by National Rural Electric Cooperative Association [Service Date: 11/14/2011] [11-1381] (Wehrum, William)
11/14/11	DOCKETING STATEMENT FILED [1341542] by Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374 [Service Date: 11/14/2011] [11-1374] (Zosa, Marie)
11/14/11	STATEMENT OF ISSUES FILED [1341543] by Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and

DATE	PROCEEDINGS
	Westar Energy, Inc. in 11-1374 [Service Date: 11/14/2011] [11-1374] (Zosa, Marie)
11/14/11	MOTION filed [1341546] by EPA to govern future proceedings. (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 1-10. [11-1329] (Gualtieri, David)
11/14/11	DOCKETING STATEMENT FILED [1341557] by Southwestern Public Service Company [Service Date: 11/14/2011] [11-1375] (Frank, Joshua)
11/14/11	STATEMENT OF ISSUES FILED [1341559] by Southwestern Public Service Company [Service Date: 11/14/2011] [11-1375] (Frank, Joshua)
11/14/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341560] by Southwestern Public Service Company [Service Date: 11/14/2011] Intent: Appx Deferred [11-1375] (Frank, Joshua)
11/14/11	DOCKETING STATEMENT FILED [1341569] by Northern States Power Company (a Minnesota corporation) [Service Date: 11/14/2011] [11-1376] (Frank, Joshua)
11/14/11	STATEMENT OF ISSUES FILED [1341571] by Northern States Power Company (a Minnesota corporation) [Service Date: 11/14/2011] [11-1376] (Frank, Joshua)

DATE	PROCEEDINGS
11/14/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341572] by Northern States Power Company (a Minnesota corporation) [Service Date: 11/14/2011] Intent: AppxDeferred [11-1376] (Frank, Joshua)
11/14/11	DOCKETING STATEMENT FILED [1341575] by Peabody Energy Corporation [Service Date: 11/14/2011] [11-1366] (Collier, Tameka)
11/14/11	STATEMENT OF ISSUES FILED [1341576] by Peabody Energy Corporation [Service Date: 11/14/2011] [11-1366] (Collier, Tameka)
11/14/11	INCORRECT DOCKET ENTRY-DISREGARD—DOCKETING STATEMENT FILED [1341616] by East Kentucky Power Cooperative, Inc. [Service Date: 11/14/2011] [11-1384]—[Edited 11/15/2011 by LMF] (Papez, Elizabeth)
11/14/11	STATEMENT OF ISSUES FILED [1341620] by East Kentucky Power Cooperative, Inc. [Service Date: 11/14/2011] [11-1384] (Papez, Elizabeth)
11/14/11	DOCKETING STATEMENT FILED [1341626] by State of Indiana in 11-1372 [Service Date: 11/14/2011] [11-1372] (Tachtiris, Valerie)

DATE	PROCEEDINGS
11/14/11	STATEMENT FILED [1341628] by East Kentucky Power Cooperative, Inc. concerning appendix deferral [Service Date: 11/14/2011] [11-1384] (Papez, Elizabeth)
11/14/11	DOCKETING STATEMENT FILED [1341629] by Louisiana Chemical Association in 11-1365 [Service Date: 11/14/2011] [11-1365] (Collins, Tokesha)
11/14/11	STATEMENT OF ISSUES FILED [1341634] by Louisiana Chemical Association in 11-1365 [Service Date: 11/14/2011] [11-1365] (Collins, Tokesha)
11/14/11	STATEMENT OF ISSUES FILED [1341635] by State of Indiana in 11-1372 [Service Date: 11/14/2011] [11-1372] (Tachtiris, Valerie)
11/14/11	DOCKETING STATEMENT FILED [1341637] by Lafayette Utilities System in 11-1361 [Service Date: 11/14/2011] [11-1361] (Collins, Tokesha)
11/14/11	STATEMENT OF ISSUES FILED [1341638] by Lafayette Utilities System in 11-1361 [Service Date: 11/14/2011] [11-1361] (Collins, Tokesha)
11/14/11	DOCKETING STATEMENT FILED [1341641] by Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364

DATE	PROCEEDINGS
	[Service Date: 11/14/2011] [11-1364] (Terrell, Megan)
11/14/11	STATEMENT OF ISSUES FILED [1341643] by Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364 [Service Date: 11/14/2011] [11-1364] (Terrell, Megan)
11/14/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341645] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373 [Service Date: 11/14/2011] Intent: AppxDeferred [11-1373] (Manning, Robert)
11/14/11	MOTION filed [1341655] by Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana to extend time to file reply to 11/23/2011. (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 1-10. [11-1364] (Terrell, Megan)
11/14/11	STATEMENT OF ISSUES FILED [1341658] by Wisconsin Electric Power Company in 11-1363 [Service Date: 11/14/2011] [11-1363] (Splitek, Matthew)
11/14/11	DOCKETING STATEMENT FILED [1341661] by Wisconsin Electric Power Com-

DATE	PROCEEDINGS
	pany in 11-1363 [Service Date: 11/14/2011] [11-1363] (Splitek, Matthew)
11/14/11	CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES FILED [1341664] by Wisconsin Electric Power Company in 11-1363 [Service Date: 11/14/2011] [11-1363] (Splitek, Matthew)
11/14/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341665] by Wisconsin Electric Power Company in 11-1363 [Service Date: 11/14/2011] Intent: AppxDeferred [11-1363] (Splitek, Matthew)
11/14/11	DOCKETING STATEMENT FILED [1341672] by Mississippi Public Service Commission [Service Date: 11/14/2011] [11-1386] (Pizzetta, Harold)
11/14/11	STATEMENT OF ISSUES FILED [1341677] by Mississippi Public Service Commission [Service Date: 11/14/2011] [11-1386] (Pizzetta, Harold)
11/14/11	DOCKETING STATEMENT FILED [1341685] by AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric

DATE	PROCEEDINGS
	Power Company [Service Date: 11/14/2011] [11-1369] (Henry, Janet)
11/14/11	STATEMENT OF ISSUES FILED [1341687] by AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company [Service Date: 11/14/2011] [11-1369] (Henry, Janet)
11/14/11	STATEMENT OF ISSUES FILED [1341690] by CPI USA North Carolina LLC [Service Date: 11/14/2011] [11-1385] (Lane, William)
11/14/11	REPLY FILED [1341692] by Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont to response [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 1-10. [11-1329] (Levine, Matthew)
11/14/11	STATEMENT OF ISSUES FILED [1341695] by South Mississippi Electric Power Association [Service Date: 11/14/2011] [11-1380] (Rikard, Gary)
11/14/11	DOCKETING STATEMENT FILED [1341696] by CPI USA North Carolina LLC

DATE	PROCEEDINGS
	[Service Date: 11/14/2011] [11-1385] (Lane, William)
11/14/11	DOCKETING STATEMENT FILED [1341697] by City of Springfield, Illinois, Office of Public Utilities [Service Date: 11/14/2011] [11-1368] (Nickel, Henry)
11/14/11	DOCKETING STATEMENT FILED [1341698] by South Mississippi Electric Power Association [Service Date: 11/14/2011] [11-1380] (Rikard, Gary)
11/14/11	STATEMENT OF ISSUES FILED [1341699] by City of Springfield, Illinois, Office of Public Utilities [Service Date: 11/14/2011] [11-1368] (Nickel, Henry)
11/14/11	DOCKETING STATEMENT FILED [1341705] by City of Ames, Iowa [Service Date: 11/14/2011] [11-1378] (Ritts, Leslie)
11/14/11	STATEMENT OF ISSUES FILED [1341708] by City of Ames, Iowa [Service Date: 11/14/2011] [11-1378] (Ritts, Leslie)
11/14/11	DOCKETING STATEMENT FILED [1341710] by Consolidated Edison Company of New York, Inc. in 11-1388 [Service Date: 11/14/2011] [11-1388] (Berge, Megan)
11/14/11	MOTION filed [1341711] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-

DATE	PROCEEDINGS
	1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to govern future proceedings. (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
11/14/11	STATEMENT FILED [1341712] by Consolidated Edison Company of New York, Inc. in 11-1388 concerning appendix deferral [Service Date: 11/14/2011] [11-1388] (Berge, Megan)
11/14/11	STATEMENT OF ISSUES FILED [1341715] by Consolidated Edison Company of New York, Inc. in 11-1388 [Service Date: 11/14/2011] [11-1388] (Berge, Megan)

DATE	PROCEEDINGS
11/14/11	DOCKETING STATEMENT FILED [1341717] by Western Farmers Electric Cooperative in 11-1387 [Service Date: 11/14/2011] [11-1387] (Berge, Megan)
11/14/11	STATEMENT FILED [1341718] by Western Farmers Electric Cooperative in 11-1387 concerning appendix deferral [Service Date: 11/14/2011] [11-1387] (Berge, Megan)
11/14/11	STATEMENT OF ISSUES FILED [1341719] by Western Farmers Electric Cooperative in 11-1387 [Service Date: 11/14/2011] [11-1387] (Berge, Megan)
11/14/11	*CORRECTED* DOCKETING STATEMENT FILED [1341720] by Western Farmers Electric Cooperative in 11-1387 [Service Date: 11/14/2011] [11-1387] (Berge, Megan)
11/14/11	DOCKETING STATEMENT FILED [1341723] by State of Georgia [Service Date: 11/14/2011] [11-1367] (Nickel, Henry)
11/14/11	STATEMENT OF ISSUES FILED [1341725] by State of Georgia [Service Date: 11/14/2011] [11-1367] (Nickel, Henry)
11/14/11	DOCKETING STATEMENT FILED [1341726] by East Kentucky Power Cooperative, Inc. [Service Date: 11/14/2011] [11-1384] (Papez, Elizabeth)
11/14/11	MODIFIED EVENT FROM FILED TO LODGED—MOTION filed [1341729] by

DATE	PROCEEDINGS
	State of Indiana in 11-1372 Motion for Stay of Effectiveness. (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 16-20. [11-1372]—[Edited 11/16/2011 by LMC] (Tachtiris, Valerie)
11/14/11	MOTION filed [1341730] by State of Indiana in 11-1372 for leave to file motion (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/14/2011 by CM/ECF NDA] Pages: 1-10. [11-1372] (Tachtiris, Valerie)
11/14/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341731] by State of Indiana in 11-1372 [Service Date: 11/14/2011] Intent: AppxDeferred [11-1372] (Tachtiris, Valerie)
11/14/11	DOCKETING STATEMENT FILED [1341732] by Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389 [Service Date: 11/14/2011] [11-1389] (Campbell, Margaret)
11/14/11	STATEMENT OF ISSUES FILED [1341733] by Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power

DATE	PROCEEDINGS
	Company in 11-1389 [Service Date: 11/14/2011] [11-1389] (Campbell, Margaret)
11/14/11	STATEMENT OF ISSUES FILED [1341736] by State of Ohio in 11-1392 [Service Date: 11/14/2011] [11-1392] (Vitale, Dale)
11/15/11	STATEMENT OF INTENT REGARDING APPENDIX DEFERRAL FILED [1341779] by Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. [Service Date: 11/15/2011] Intent: AppxDeferred [11-1377] (Palmer, Todd)
11/15/11	DOCKETING STATEMENT FILED [1341802] by International Brotherhood of Electrical Workers, AFL-CIO in 11-1390 [Service Date: 11/15/2011] [11-1390, 11-1302] (Yellig, Terry)
11/15/11	STATEMENT OF ISSUES FILED [1341803] by International Brotherhood of Electrical Workers, AFL-CIO in 11-1390 [Service Date: 11/15/2011] [11-1390, 11-1302] (Yellig, Terry)
11/15/11	CERTIFICATE OF SERVICE [1341824] to statement [1341665-2], certificate [1341664-2], statement [1341661-2], statement [1341658-2] filed by Wisconsin Electric Power

DATE	PROCEEDINGS
	Company in 11-1363. [11-1363, 11-1302] (Splitek, Matthew)
11/15/11	NOTICE FILED [1342025] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 Noting non-opposition to extension motion. [Service Date: 11/15/2011] [11-1364, 11-1302] (Donahue, Sean)
11/15/11	*CORRECTED* MOTION filed [1342027] by State of Ohio in 11-1392 Motion for Stay of Final Rule. (Response to Motion served by mail due on 12/01/2011) [Service Date: 11/15/2011 by CM/ECF NDA] Pages: 21-30. [11-1392] (Vitale, Dale)
11/18/11	CLERK'S ORDER filed [1342871] granting motion to extend time [1341655-2]; reply in support of motion to stay case [1334498-2] now due 11/23/2011 [11-1364]
11/21/11	ENTRY OF APPEARANCE filed [1343143] by Todd E. Palmer and co-counsel Jordan J. Hemaidan on behalf of Petitioners Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc.. [11-1377] (Hemaidan, Jordan)
11/21/11	NOTICE FILED [1343315] by Public Utility Commission of Texas, Railroad Commission

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	of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338 . [Service Date: 11/21/2011] [11-1338] (Davis, Bill)
11/23/11	REPLY FILED [1343811] by Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana to response [Service Date: 11/23/2011 by CM/ECF NDA] Pages: 11-15. [11-1364] (Terrell, Megan)
11/23/11	*JOINT* RESPONSE IN OPPOSITION FILED [1343837] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, San Miguel Electric Cooperative and EME Homer City Generation, L.P. in 11-1302, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican

DATE	PROCEEDINGS
	Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, City of Springfield, Illinois, Office of Public Utilities in 11-1368, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edi-

DATE	PROCEEDINGS
	son Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394 to motion to govern future proceedings [1341711-2] [Service Date: 11/23/2011 by CM/ECF NDA] Pages: 16-20. [11-1315, 11-1302, 11-1323, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1365, 11-1366, 11-1368, 11-1369, 11-1371, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1394] (Brownell, F.)
11/23/11	RESPONSE IN OPPOSITION FILED [1343942] by State of Ohio [Service Date: 11/23/2011 by CM/ECF NDA] Pages: 1-10. [11-1392] (Vitale, Dale)
11/23/11	RESPONSE IN SUPPORT FILED [1343943] by State of Ohio in 11-1392 to mo-

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	tion for leave to intervene. [1341137-2], motion for leave to intervene. [1340460-2], motion for leave to intervene. [1340452-2], motion for leave to intervene. [1340077-2], motion for leave to intervene. [1337408-2] [Service Date: 11/23/2011 by CM/ECF NDA] Pages: 1-10. [11-1392, 11-1302] (Vitale, Dale)
11/28/11	PER CURIAM ORDER filed [1344036] granting motion of the State of Indiana for leave to file a motion for stay; The parties are directed to comply with the schedule and format established in the court's 11/14/11 order for responses to the stay motion and the reply. [1341730-2] (in 11-1372) Before Judges: Garland, Brown and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]-- [Edited 11/28/2011 by CWC]
11/28/11	PER ABOVE ORDER lodged motion to stay case [1341729-2] is filed [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-

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	1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
11/28/11	FIRST CLASS MAIL RETURNED [1344198] marked. Mail had been sent to Attorney Mr. Karl Roy Moor for Petitioner Southern Company Services, Inc. in 11-1389. [11-1389, 11-1302]
12/1/11	CLERK'S ORDER filed [1344995] granting MEAG's motion to extend time to file reply [1339586-2]. MEAG is directed to comply with the schedule and format established in the court's November 14, 2011 order for the reply. [11-1302, 11-1379]
12/1/11	RESPONSE IN OPPOSITION FILED [1345103] by City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Mayor and City Council of Baltimore, State of Illinois, State of New York and State of North Carolina in 11-1302, Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont in 11-1329 to motion to stay case [1337158-2], motion to stay case [1337266-2],

DATE	PROCEEDINGS
	motion for other relief [1337415-2], motion for other relief [1337439-2], motion for other relief [1338085-2], motion for other relief [1339374-2], motion to stay case [1342027-3], motion to stay case [1335586-2], motion to stay case [1335573-2], motion to stay case [1341729-2] [Service Date: 12/01/2011 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Bernstein, Marc)
12/1/11	*JOINT* RESPONSE IN OPPOSITION FILED [1345206] by State of Kansas to motion to govern future proceedings [1341546-2] [Service Date: 12/01/2011 by CM/ECF NDA] Pages: 1-10. [11-1329] (Nickel, Henry)

DATE	PROCEEDINGS
12/1/11	RESPONSE IN OPPOSITION FILED [1345210] by EPA in 11-1364 to motion to stay case [1342027-3], motion to stay case [1341729-2], motion for other relief [1339374-2], motion for other relief [1338085-2], motion for other relief [1337439-2], motion for other relief [1337415-2], motion to stay case [1337266-2], motion to stay case [1337158-2], motion to stay case [1335586-2] [Service Date: 12/01/2011 by CM/ECF NDA] Pages: Exceeds Limits (as ordered). [11-1302, 11-1329, 11-1360, 11-1363, 11-1364, 11-1372, 11-1374, 11-1378, 11-1379, 11-1392, 11-1393, 11-1394] (Gualtieri, David)
12/1/11	RESPONSE IN OPPOSITION FILED [1345215] by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 to motion to stay case [1342027-3], motion to stay case [1341729-2], motion for other relief [1339374-2], motion for other relief [1338085-2], motion for other relief [1337439-2], motion for other relief [1337415-2], motion to stay case [1337266-2], motion to stay case [1337158-2], motion to stay case [1335586-2], motion to stay case [1335573-2] [Service Date: 12/01/2011 by CM/ECF NDA] Pages: 11-15. [11-1302, 11-1360, 11-1363, 11-1372, 11-1373, 11-

DATE	PROCEEDINGS
	1374, 11-1378, 11-1379, 11-1392, 11-1393, 11-1394] (Donahue, Sean)
12/1/11	*JOINT* RESPONSE IN OPPOSITION FILED [1345216] by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. in 11-1302 to motion to stay case [1341729-2], motion for other relief [1339374-2], motion for other relief [1338085-2], motion for other relief [1337439-2], motion for other relief [1337415-2], motion to stay case [1337266-2], motion to stay case [1337158-2], motion to stay case [1335586-2], motion to stay case [1335573-2], motion to stay case [1342027-3] [Service Date: 12/01/2011 by CM/ECF NDA] Pages: 11-15. [11-1302, 11-1360, 11-1363, 11-1372, 11-1373, 11-1374, 11-1378, 11-1379, 11-1392, 11-1393, 11-1394] (McKinstry, Robert)
12/5/11	MOTION filed [1345691] by Public Service Enterprise Group, Inc. to substitute attorney James W. Rubin for Kurt E. Blase (Response to Motion served by mail due on 12/19/2011) [Service Date: 12/05/2011 by CM/ECF NDA] Pages: 1-10. [11-1302] (Rubin, James)
12/5/11	CERTIFIED INDEX TO RECORD [1345709] by EPA in 11-1329 [Service Date: 12/05/2011] [11-1329, 11-1302] (Gualtieri, David)

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12/5/11	CERTIFIED INDEX TO RECORD [1345826] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 [Service Date: 12/05/2011] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
12/55/11	REPLY FILED [1345830] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-

DATE	PROCEEDINGS
	1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to response [1343942-2], [1343837-2] [Service Date: 12/05/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
12/6/11	ENTRY OF APPEARANCE filed [1345970] by Margaret Claiborne Campbell and co-counsel Hahnah Williams on behalf of Petitioners Georgia Power Company, Southern Company Services, Inc. and Southern Power Company. [11-1389] (Williams, Hahnah)
12/9/11	LETTER FILED [1346904] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC pursuant to FRAP 28j

DATE	PROCEEDINGS
	a[illegible]sing of additional authorities [Service Date: 12/09/2011] [11-1315] (Keisler, Peter)
12/9/11	RELIEF REMOVED—REPLY FILED [1346907] by City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, State of Ohio in 11-1392, State of Wisconsin in 11-1393 to response [1345210-2] [Service Date: 12/09/2011 by CM/ECF NDA, US Mail] Pages: 21-30. [11-1302, 11-1372, 11-1378, 11-1392, 11-1393]—[Edited 12/12/2011 by LMC] (Ritts, Leslie)
12/9/11	DOCKET ENTRY-DISREGARD—REPLY FILED [1346908] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, Entergy Corporation in 11-1360, Wisconsin Electric Power Company in 11-1363, Kansas City Board of Public Utilities in 11-1374, Municipal Electric Authority of Georgia in 11-1379, Dairyland Power Cooperative in 11-1394 to response [1345210-2], [1345216-2], [1345215-2], [1345103-2] [Service Date: 12/09/2011 by CM/ECF NDA, US Mail] Pages: 21-30. [11-1373, 11-1360, 11-1363, 11-1374, 11-1379, 11-1394]—[Edited 12/13/2011 by KRM] (Manning, Robert)
12/12/11	REPLY FILED [1347102] by EPA in 11-1302 to response [1345206-2] [Service Date: 12/

DATE	PROCEEDINGS
	12/2011 by CM/ECF NDA] Pages: 1-10. [11-1329, 11-1302] (Gualtieri, David)
12/12/11	*AMENDED* REPLY FILED [1347129] by Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, Entergy Corporation in 11-1360, Wisconsin Electric Power Company in 11-1363, Kansas City Board of Public Utilities in 11-1374, Municipal Electric Authority of Georgia in 11-1379, Dairyland Power Cooperative in 11-1394 to response [1345103-2], [1345210-2], [1345215-2], [1345216-2] [Service Date: 12/12/2011 by US Mail, CM/ECF NDA] Pages: 21-30. [11-1373, 11-1360, 11-1363, 11-1374, 11-1379, 11-1394] (Manning, Robert)
12/12/11	*UNOPPOSED* MOTION filed [1347177] by EME Homer City Generation, L.P. in 11-1302, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, Westar Energy, Inc. in 11-1374, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389 Petitioners' Motion to Request that the Court Release its Decision on the Pending Stay Motions in a Way that Avoids Unecessary Disruptions in Trading Markets. [Service Date: 12/12/2011] Pages: 1-10. [11-1302, 11-1315,

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	11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Holmstead, Jeffrey)
12/13/11	RESPONSE FILED [1347409] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315 to letter Rule 28j authorities [1346904-2], letter [1346904-3] [Service Date: 12/13/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315] (Lipshultz, Jon)
12/14/11	CLERK'S ORDER filed [1347595] granting motion to substitute attorney [1345691-2] in 11-1302. Kurt E. Blase has been replaced by James W. Rubin as attorney for intervenor Public Service Enterprise Group, Ltd. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-

DATE	PROCEEDINGS
	1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
12/14/11	LETTER FILED [1347666] by EPA pursuant to FRAP 28j advising of additional authorities [Service Date: 12/14/2011] [11-1329] (Gualtieri, David)
12/16/11	RESPONSE IN SUPPORT FILED [1348196] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to motion for other relief [1347177-2] [Service Date: 12/16/2011 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)

DATE	PROCEEDINGS
12/16/11	*CORRECTED* MOTION filed [1348237] by GenOn Energy, Inc. in 11-1323 Petitioners' Supplemental and Corrected Motion to Request that the Court Release its Decision on the Pending Stay Motions in a way that Avoids Unnecessary Disruptions in Trading Markets. [Service Date: 12/16/2011] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Holmstead, Jeffrey)
12/30/11	PER CURIAM ORDER filed [1350421] denying the motion regarding advance notice of the release of the court's decision [1348237-2], [1347177-2]; granting motion to exceed page limits [1330154-2] in 11-1302, [1340107-2] in 11-1375, [1334839-2] in 11-1315; referring motion to dismiss the State of Texas' petition [1335282-2] to the merits panel to which this case is assigned. in 11-1302, 11-1338; granting motion to stay case [1337266-2] in 11-1302, 11-1378, [1337158-2], [1325939-2] in 11-1302, [1329866-2] in 11-1315, [1329612-2] in 11-1323, [1331220-3] in 11-1338, [1331348-2] in 11-1340,

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	[1334498-2] in 11-1364, [1335573-2] in 11-1373, [1335586-2] in 11-1379; [1332841-2] in 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, [1333691-2] in 11-1329, [1337439-2], [1338085-2] in 11-1302, 11-1360, [1339374-2] in 11-1363, [1334350-2] in 11-1375, [1337415-2] in 11-1302, 11-1393; [1340062-4] in 11-1302, 11-1329, 11-1360, 11-1363, 11-1364; FURTHER ORDERED that the motion to govern be granted in part. The request to designate the case "complex" is granted. Petitioners are directed to identify lead or liaison counsel for appropriate groups of petitioners at the time briefing proposals are due. [1341711-2], directing party to file briefing format—Proposed formats due 01/17/2012 Before Judges: Rogers, Griffith and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
12/30/11	PER ABOVE ORDER lodged reply [1330156-2] is filed [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362,

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	11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
1/5/12	ENTRY OF APPEARANCE filed [1351128] by Bart E. Cassidy and co-counsel Katherine L. Vaccaro Diana A. Silva on behalf of Petitioner Sunbury Generation LP in 11-1382. [11-1382] (Silva, Diana)
1/5/12	ENTRY OF APPEARANCE filed [1351130] by Bart E. Cassidy and co-counsel Katherine L. Vaccaro Diana A. Silva on behalf of Petitioner ARIPPA in 11-1383. [11-1383] (Silva, Diana)
1/5/12	CLERK'S ORDER filed [1351287] granting motion for leave to intervene. [1340478-2], granting motion for leave to intervene. [1340460-2], granting motion for leave to intervene. [1340077-2], granting motion for leave to intervene. [1339820-2], granting motion for leave to intervene. [1337408-2], granting motion for leave to intervene. [1336874-2], granting motion for leave to intervene. [1336655-2] [11-1302]
1/9/12	CLERK'S ORDER filed [1351681] granting motion for leave to intervene. [1336419-2] in

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	11-1329 [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]

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1/10/12	PER CURIAM ORDER filed [1351933] granting in part motion to govern future proceedings [1341553-2] [1341546-2] [1341551-2]. The challenge by the State of Kansas in No. 11-1329 to the Environmental Protection Agency's "Approval and Promulgation of Air Quality Implementation Plan; Kansas; Final Disapproval of Interstate Transport State Implementation Plan Revision for the 2006 24-hour PM2.5 NAAQS," 76 Fed. Reg. 43,143 (July 20, 2011), is hereby severed and assigned a separate docket number, No. 12-1019. This severed petition is consolidated with No. 11-1333. Directing that the parties submit by January 17, 2012, motions to govern addressing any further consolidation of Nos. 11-1333, et al. and No. 11-1427 and the potential coordination of these cases with No. 11-1302, et al. Further directing the parties submit by January 17, 2012, proposed formats for the briefing of Nos. 11-1333, et al. and No. 11-1427. Before Judges: Rogers, Garland and Brown. [11-1333, 11-1302, 11-1329, 11-1427, 12-1019]
1/17/12	RESPONSE FILED [1353024] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-

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	1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to order [1350421-3] [1350421-4], [1350421-2] [Service Date: 01/17/2012 by CM/ECF NDA] Pages: 11-15. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
1/17/12	MOTION filed [1353041] by Wisconsin Public Service Corporation in 11-1350, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, State of Wisconsin in 11-1393, Dairyland Power Cooperative in 11-1394 Leave to file short supplemental briefs. (Response to Motion served by mail due on 01/30/2012) [Service Date: 01/17/2012 by CM/ECF NDA] Pages: 1-10. [11-1350, 11-1377, 11-1393, 11-1394] (Stoll, Richard)
1/17/12	RELIEF REPLACED—MOTION filed [1353044] by East Kentucky Power Coopera-

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	tive, Inc. in 11-1384 to file seperate brief (Response to Motion served by mail due on 01/30/2012) [Service Date: 01/17/2012 by CM/ECF NDA]. [11-1384]—[Edited 01/18/2012 by KRM] (Papez, Elizabeth)
1/17/12	*JOINT* RESPONSE FILED [1353049] by San Miguel Electric Cooperative and EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, Putnam County, Georgia and GenOn Energy, Inc. in 11-1323, Putnam County, Georgia and State of Kansas in 11-1329, Putnam County, Georgia and Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, Putnam County, Georgia and State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Putnam County, Georgia and Wisconsin Public Service Corporation in 11-1350, Putnam County, Georgia and National Min-

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ing Association in 11-1357, Putnam County, Georgia and Utility Air Regulatory Group in 11-1358, Putnam County, Georgia and American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Putnam County, Georgia and Entergy Corporation in 11-1360, Putnam County, Georgia and Midwest Ozone Group in 11-1362, Putnam County, Georgia and Wisconsin Electric Power Company in 11-1363, Putnam County, Georgia and Lafayette Utilities System in 11-1361, Putnam County, Georgia and Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Putnam County, Georgia and Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, City of Springfield, Illinois, Office of Public Utilities in 11-1368, Putnam County, Georgia and United Mine Workers of America in 11-1371, Putnam County, Georgia and AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Com-

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pany, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Putnam County, Georgia and Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Putnam County, Georgia and Southwestern Public Service Company in 11-1375, Putnam County, Georgia and City of Ames, Iowa in 11-1378, Putnam County, Georgia and Northern States Power Company (a Minnesota corporation) in 11-1376, Putnam County, Georgia and Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Putnam County, Georgia and Municipal Electric Authority of Georgia in 11-1379, Putnam County, Georgia and South Mississippi Electric Power Association in 11-1380, Putnam County, Georgia and National Rural Electric Cooperative Association in 11-1381, Putnam County, Georgia and Consolidated Edison Company of New York, Inc. in 11-1388, State of Indiana in 11-1372, Putnam County, Georgia and Western Farmers Electric Cooperative in 11-1387, Putnam County, Georgia and Sunbury Generation LP in 11-1382, Putnam County, Georgia and ARIPPA in 11-1383, Putnam County, Georgia and East Kentucky Power Cooperative, Inc. in 11-1384,

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	Putnam County, Georgia and CPI USA North Carolina LLC in 11-1385, Putnam County, Georgia and Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, Putnam County, Georgia and Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, Putnam County, Georgia and DTE Stoneman, LLC in 11-1391, Putnam County, Georgia and International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Putnam County, Georgia and State of Wisconsin in 11-1393, Putnam County, Georgia and Dairyland Power Cooperative in 11-1394, Putnam County, Georgia and Environmental Energy Alliance of New York, LLC in 11-1395 to order [1350421-3], [1350421-4], [1350421-2] [Service Date: 01/17/2012 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390,

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	11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Brownell, F.)
1/18/12	MOTION filed [1353131] by State of New York and City of New York for leave to file separate briefs [Disclosure Listing: Not Applicable to this Party] [Service Date: 01/18/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 01/18/2012 by LMF] (Frank, Andrew)
1/18/12	PER CURIAM ORDER filed [1353334] denying motion to file brief to be separate [1353131-2] [1353044-3] [1353041-2], FURTHER ORDERED that petitioners' request to bifurcate briefing be denied, setting briefing schedule: PETITIONER Brief due 02/09/2012. JOINT INTERVENOR and AMICUS CURIAE for PETITIONER Brief due 02/14/2012. RESPONDENT Brief due on 03/01/2012. INTERVENOR for RESPONDENT Brief due 03/06/2012. PETITIONER Reply Brief due 03/12/2012. Appendix due 03/14/2012. FINAL Briefs due 03/16/

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	2012. Before Judges: Rogers, Garland and Brown. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395, 12-1023, 12-1026]
1/18/12	CLERK'S ORDER filed [1353335] granting motion to participate as amicus curiae [1339032-2]. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395, 12-1023, 12-1026]
1/19/12	RESPONSE IN OPPOSITION FILED [1353517] by EPA and Lisa Perez Jackson in 12-1023, EPA in 12-1026 to motion to consolidate [1353194-2], motion to consolidate [1352902-2] [Service Date: 01/19/2012 by

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	CM/ECF NDA] Pages: 1-10. [12-1023, 12-1026] (Rave, Norman)
1/19/12	ENTRY OF APPEARANCE filed [1353598] by Michael J. Nasi and co-counsel Robert M. Cohan on behalf of Intervenor for Petitioner San Miguel Electric Cooperative in 11-1302. [11-1302, 11-1338] (Nasi, Michael)
1/19/12	RESPONSE FILED [1353633] by San Miguel Electric Cooperative in 11-1302 to order [1351287-2] [Service Date: 01/19/2012 by CM/ECF NDA, US Mail] Pages: 1-10. [11-1302, 11-1338] (Nasi, Michael)
1/20/12	*JOINT* MOTION filed [1353885] by Utility Air Regulatory Group and EPA in 11-1358 to sever issue [Service Date: 01/20/2012] Pages: 1-10. [11-1302, 11-1358] (Freeman, Lauren)
1/20/12	CLERK'S ORDER filed [1353917] scheduling oral argument before Judges ROGERS, GRIFFITH, KAVANAUGH Friday, 04/13/2012 AM [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389,

DATE	PROCEEDINGS
	11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
1/23/12	MODIFIED PARTY FILER—*UNOPPOSED* MOTION filed [1354114] by Southeastern Legal Foundation, Inc. to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 01/23/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 12-1043, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395, 12-1023, 12-1026]—[Edited 01/24/2012 by HTS] (Henderson, Douglas)
1/23/12	CLERK'S ORDER filed [1354116] granting motion to sever certain issues and to hold case in abeyance [1353885-2]. The issues set forth in numbered paragraphs 9 and 10 of the Non-Binding Statement of Issues in case No. 11-1358 are hereby severed from the above-captioned cases, and docketed as new case, No. 12-1043. Any other petitioner and any intervenor in the above-captioned consolidated cases who wishes to participate in No. 12-1043 must so notify the court in writing within 30 days of the date of this order. It is

DATE	PROCEEDINGS
	FURTHER ORDERED that No. 12-1043 be held in abeyance pending further order of the court. The Environmental Protection Agency is directed to file status reports in No. 12-1043 at 90 day intervals beginning 90 days from the date of this order. The parties are directed to file motions to govern future proceedings in No. 12-1043 within 30 days of the conclusion of settlement proceedings. [12-1043, 11-1302, 11-1358]
1/23/12	CLERK'S ORDER filed [1354208] granting petitioners' motion to withdraw the motion to consolidate. The Clerk is directed to note the docket accordingly. [1354098-2] [12-1023, 12-1026]
1/24/12	MODIFIED PARTY FILER—*UNOPPOSED* MOTION filed [1354311] by Industrial Energy Consumers of America to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 01/24/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—

DATE	PROCEEDINGS
	[Edited 01/24/2012 by HTS] (Henderson, Douglas)
1/26/12	CLERK'S ORDER filed [1354827], on the court's own motion, that in addition to the electronic filing, the parties file nine (9) paper copies of their initial briefs in accordance with the schedule set forth in the January 18, 2012 briefing order. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
2/1/12	LETTER SENT [1355926] concerning oral argument format—Proposed formats due 03/02/2012. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]

DATE	PROCEEDINGS
2/1/12	ENTRY OF APPEARANCE filed [1356038] by Sean H. Donahue and co-counsel David T. Lifland on behalf of Intervenor for Respondent Environmental Defense Fund in 11-1302. [11-1302] (Lifland, David)
2/3/12	CLERK'S ORDER filed [1356497] granting the motions of movant-amicus curiae Industrial Energy Consumers of America and Southeastern Legal Foundation for leave to participate as amicus curiae [1354311-2] [1354114-2] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
2/8/12	LETTER FILED [1357299] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-

DATE	PROCEEDINGS
	1390, 11-1393, 11-1394, 11-1395 pursuant to FRAP 28j advising of additional authorities [Service Date: 02/08/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
2/9/12	PETITIONER BRIEF [1357526] filed by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Com-

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pany, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edi-

DATE	PROCEEDINGS
	son Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 02/09/2012] Length of Brief: 14,339. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
2/9/12	PETITIONER BRIEF [1357570] filed by State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission

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	on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, City of Springfield, Illinois, Office of Public Utilities in 11-1368, City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, State of Wisconsin in 11-1393 [Service Date: 02/09/2012] Length of Brief: 13,379 words. [11-1329, 11-1338, 11-1340, 11-1364, 11-1367, 11-1368, 11-1372, 11-1378, 11-1386, 11-1392, 11-1393] (Davis, Bill)
2/14/12	NOTICE FILED [1358306] by City of New York and State of New York in 11-1388 advising that a brief will not be filed. [Service Date: 02/14/2012] [11-1388] (Frank, Andrew)
2/14/12	MODIFIED PARTY FILER—MOTION filed [1358426] by American Thoracic Society to participate as amicus curiae. [Disclosure Listing: Attached] [Service Date: 02/14/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-

DATE	PROCEEDINGS
	1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 02/15/2012 by LMC] (Marshall, David)
2/14/12	MODIFIED PARTY FILER—AMICUS FOR PETITIONER BRIEF [1358441] filed by San Miguel Electric Cooperative (Intervenor for Petitioner), Industrial Energy Consumers of America, Putnam County, Georgia and Southeastern Legal Foundation, Inc. [Service Date: 02/14/2012] Length of Brief: 6787. [11-1302]—[Edited 02/15/2012 by LMC] (Henderson, Douglas)
2/16/12	CLERK'S ORDER filed [1358847] granting the motion of movant-amicus American Thoracic Society for leave to participate as amicus curiae [1358426-2] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-

DATE	PROCEEDINGS
	1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
2/24/12	ENTRY OF APPEARANCE filed [1360357] by Andrew G. Frank and co-counsel Michael J. Myers, Simon Heller on behalf of Intervenor for Respondent State of New York in 11-1302. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394] (Heller, Simon)
3/1/12	RESPONDENT BRIEF [1361451] filed by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 [Service Date: 03/01/2012] Length of Brief: 27,740. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359,

DATE	PROCEEDINGS
	11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Gualtieri, David)
3/2/12	*JOINT* RESPONSE FILED [1361745] by EME Homer City Generation, L.P. and EPA in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC, Sandow Power Company, LLC and EPA and Lisa Perez Jackson in 11-1315, GenOn Energy, Inc. and EPA in 11-1323, State of Kansas and EPA in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality, Texas General Land Office and EPA and Lisa Perez Jackson in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas, State of Virginia and EPA in 11-1340, Wisconsin Public Service Corporation and

DATE	PROCEEDINGS
	EPA and Lisa Perez Jackson in 11-1350, National Mining Association and EPA in 11-1357, Utility Air Regulatory Group and EPA in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated, UtahAmerican Energy, Inc. and EPA and Lisa Perez Jackson in 11-1359, Entergy Corporation and EPA and Lisa Perez Jackson in 11-1360, Midwest Ozone Group and EPA in 11-1362, Wisconsin Electric Power Company and EPA in 11-1363, Lafayette Utilities System and EPA in 11-1361, Louisiana Department of Environmental Quality, Louisiana Public Service Commission, State of Louisiana and EPA in 11-1364, State of Georgia and EPA in 11-1367, Peabody Energy Corporation and EPA in 11-1366, Louisiana Chemical Association and EPA in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. and EPA and Lisa Perez Jackson in 11-1373, City of Springfield, Illinois, Office of Public Utilities and EPA in 11-1368, United Mine Workers of America and EPA in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of

DATE	PROCEEDINGS

Oklahoma, Southwestern Electric Power Company and EPA and Lisa Perez Jackson in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation, Westar Energy, Inc. and EPA in 11-1374, Southwestern Public Service Company and EPA and Lisa Perez Jackson in 11-1375, City of Ames, Iowa and EPA in 11-1378, Northern States Power Company (a Minnesota corporation) and EPA and Lisa Perez Jackson in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce, Wisconsin Paper Council, Inc. and EPA in 11-1377, Municipal Electric Authority of Georgia and EPA and Lisa Perez Jackson in 11-1379, South Mississippi Electric Power Association and EPA and Lisa Perez Jackson in 11-1380, National Rural Electric Cooperative Association and EPA in 11-1381, Consolidated Edison Company of New York, Inc. and EPA and Lisa Perez Jackson in 11-1388, State of Indiana and EPA and Lisa Perez Jackson in 11-1372, Western Farmers Electric Cooperative and EPA in 11-1387, Sunbury Generation LP and EPA in 11-1382, ARIPPA and EPA in 11-1383, East Kentucky Power Cooperative, Inc. and EPA in 11-1384, CPI USA North Carolina LLC and EPA in 11-1385, Mississippi Public Service Commission, State of Michigan

DATE	PROCEEDINGS
	and EPA in 11-1386, State of Ohio and EPA in 11-1392, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc., Southern Power Company and EPA in 11-1389, DTE Stoneman, LLC and EPA in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO and EPA in 11-1390, State of Wisconsin and EPA in 11-1393, Dairyland Power Cooperative and EPA and Lisa Perez Jackson in 11-1394, Environmental Energy Alliance of New York, LLC and EPA in 11-1395 to letter oral argument format [1355926-2] [Service Date: 03/02/2012 by US Mail, CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Brownell, F.)
3/6/12	INTERVENOR FOR RESPONDENT BRIEF [1362256] filed by City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Commonwealth of Massachusetts, DC, Mayor and City Council

DATE	PROCEEDINGS
	of Baltimore, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, State of New York, State of North Carolina, State of Rhode Island and State of Vermont in 11-1302, City of New York in 11-1315, 11-1323, City of New York, Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont in 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394 [Service Date: 03/06/2012] Length of Brief: 4664 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Heller, Simon)
3/6/12	INTERVENOR FOR RESPONDENT BRIEF [1362257] filed by American Lung

DATE	PROCEEDINGS
	Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 [Service Date: 03/06/2012] Length of Brief: 4650 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Donahue, Sean)
3/6/12	INTERVENOR FOR RESPONDENT BRIEF [1362259] filed by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. in 11-1302 [Service Date: 03/06/2012] Length of Brief: 4,686 Words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Collins, Brendan)

DATE	PROCEEDINGS
3/7/12	ENTRY OF APPEARANCE filed [1362499] by David W. Marshall and co-counsel Ann Brewster Weeks on behalf of Amicus Curiae for Respondent American Thoracic Society and Intervenors for Respondent American Lung Association and Clean Air Council in 11-1302. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Marshall, David)
3/12/12	PETITIONER REPLY BRIEF [1363260] filed by State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, City of Springfield, Illinois, Office of Public Utilities in 11-

DATE	PROCEEDINGS
	1368, City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, State of Wisconsin in 11-1393 [Service Date: 03/12/2012] Length of Brief: 6,937 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Davis, Bill)
3/12/12	PETITIONER REPLY BRIEF [1363287] filed by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corpo-

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ration, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association

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	in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 03/12/2012] Length of Brief: 6,943 Words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
3/14/12	*JOINT* APPENDIX [1363545] filed [Volumes: 7] [Service Date: 03/14/2012] [11-

DATE	PROCEEDINGS
	1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Campbell, Margaret)
3/16/12	MODIFIED PARTY FILER—AMICUS FOR PETITIONER FINAL BRIEF [1364128] filed by Intervenor for petitioners San Miguel Electric Cooperative, and amicus for petitioners Industrial Energy Consumers of America, Putnam County, Georgia and Southeastern Legal Foundation, Inc. [Service Date: 03/16/2012] Length of Brief: 6800 Words. [11-1302]—[Edited 03/19/2012 by LMC] (Henderson, Douglas)
3/16/12	PETITIONER FINAL REPLY BRIEF [1364167] filed by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power

DATE	PROCEEDINGS
	Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest

DATE	PROCEEDINGS
	Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 03/16/2012] Length of Brief: 6,943 Words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-

DATE	PROCEEDINGS
	1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
3/16/12	RESPONDENT FINAL BRIEF [1364178] filed by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 [Service Date: 03/16/2012] Length of Brief: 27,779 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
3/16/12	ERRATA FILED [1364181] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-

DATE	PROCEEDINGS
	1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to Appellee/ Respondent final brief [1364178-2]. Reason for errata: Correction to reference in brief. [Service Date: 03/16/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
3/16/12	INTERVENOR FOR RESPONDENT FINAL BRIEF [1364188] filed by Calpine Corporation, Exelon Corporation and Public Service Enterprise Group, Inc. in 11-1302 [Service Date: 03/16/2012] Length of Brief: 4,686 Words. [11-1302] (Collins, Brendan)
3/16/12	PETITIONER FINAL BRIEF [1364190] filed by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Genera-

DATE	PROCEEDINGS
	tion Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy,

DATE	PROCEEDINGS
	Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 [Service Date: 03/16/2012] Length of Brief: 14,337 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369,

DATE	PROCEEDINGS
	11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
3/16/12	INTERVENOR FOR RESPONDENT FINAL BRIEF [1364195] filed by City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Commonwealth of Massachusetts, DC, Mayor and City Council of Baltimore, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, State of New York, State of North Carolina, State of Rhode Island and State of Vermont in 11-1302, City of New York in 11-1315, 11-1323, City of New York, Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont in 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394 [Service Date: 03/16/2012] Length of Brief: 4,655 words. [11-1302,

DATE	PROCEEDINGS
	11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Heller, Simon)
3/16/12	INTERVENOR FOR RESPONDENT FINAL BRIEF [1364198] filed by American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 [Service Date: 03/16/2012] Length of Brief: 4636. [11-1302] (Donahue, Sean)
3/16/12	PETITIONER FINAL BRIEF [1364206] filed by State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, City of Spring-

DATE	PROCEEDINGS
	field, Illinois, Office of Public Utilities in 11-1368, City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, State of Wisconsin in 11-1393 [Service Date: 03/16/2012] Length of Brief: 13,373 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Davis, Bill)
3/16/12	PETITIONER FINAL REPLY BRIEF [1364210] filed by State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, City of Springfield, Illinois, Office of Public Utilities

DATE	PROCEEDINGS
	in 11-1368, City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, State of Wisconsin in 11-1393 [Service Date: 03/16/2012] Length of Brief: 6,942 words. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Davis, Bill)
3/16/12	RESPONSE FILED [1364234] by American Lung Association, Calpine Corporation, City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Clean Air Council, Commonwealth of Massachusetts, DC, Environmental Defense Fund, Exelon Corporation, Mayor and City Council of Baltimore, Natural Resources Defense Council, Public Service Enterprise Group, Inc., Sierra Club, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, State of New York, State of North Carolina, State of Rhode Island and State of Vermont in 11-1302, City of New York in 11-1323,

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	11-1338, 11-1340 to letter oral argument format [1355926-2] [Service Date: 03/16/2012 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Collins, Brendan)
3/16/12	RESPONSE FILED [1364428] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 [Service Date: 03/19/2012 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375,

DATE	PROCEEDINGS
	11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
3/19/12	RESPONSE FILED [1364428] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 [Service Date: 03/19/2012 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
3/20/12	ENTRY OF APPEARANCE filed [1364685] by William J. Moore, III on behalf of Intervenor for Respondent City of Bridgeport,

DATE	PROCEEDINGS
	Connecticut in 11-1302. [11-1392, 11-1302] (Moore, William)
3/22/12	ERRATA FILED [1365038] by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appa-

DATE	PROCEEDINGS

lachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Wor-

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	kers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 to Appellant/Petitioner final reply brief [1364167-2]. Reason for errata: Correction to citation in brief.. [Service Date: 03/22/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
3/22/12	ERRATA FILED [1365041] by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company,

DATE	PROCEEDINGS
	American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Elec-

DATE	PROCEEDINGS
	tric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 to Appellant/Petitioner final brief [1364190-2] . Reason for errata: Correction to reference and citation in brief. [Service Date: 03/22/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)

DATE	PROCEEDINGS
3/26/12	PER CURIAM ORDER filed [1365610] considering joint proposal concerning format for oral argument [1361745-2], considering response [1364428-2], considering response [1364234-2], allocating oral argument time as follows: Petitioners—50 Minutes, Respondent—40 Minutes, Respondent/Intervenors—10 Minutes; directing party to file Form 72 notice of arguing attorney—due 04/02/2012. Before Judges: Rogers, Griffith and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
3/29/12	FORM 72 submitted by arguing attorney, Jon M. Lipshultz, on behalf of Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383,

DATE	PROCEEDINGS
	11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
3/29/12	FORM 72 submitted by arguing attorney, David S. Gualtieri, on behalf of Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379,

DATE	PROCEEDINGS
	11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Gualtieri, David)
3/29/12	FORM 72 submitted by arguing attorney, Norman L. Rave, Jr., on behalf of Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
3/29/12	FORM 72 submitted by arguing attorney, Bill Davis, on behalf of Petitioner State of Kansas in 11-1329, Petitioners Public Utility Commission of Texas, Railroad Commission of

DATE	PROCEEDINGS
	Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, Petitioners State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Petitioners Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, Petitioner State of Georgia in 11-1367, Petitioner City of Springfield, Illinois, Office of Public Utilities in 11-1368, Petitioner City of Ames, Iowa in 11-1378, Petitioner State of Indiana in 11-1372, Petitioners Mississippi Public Service Commission and State of Michigan in 11-1386, Petitioner State of Ohio in 11-1392, Petitioner State of Wisconsin in 11-1393. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Davis, Bill)
4/2/12	FORM 72 submitted by on behalf of Intervenors for Respondent Calpine Corporation, Exelon Corporation and Public Service En-

DATE	PROCEEDINGS
	terprise Group, Inc. in 11-1302. Arguing Person Information Updated for: Brendan K. Collins [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
4/2/12	FORM 72 submitted by arguing attorney, Simon Heller, on behalf of Intervenors for Respondent City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Commonwealth of Massachusetts, DC, Mayor and City Council of Baltimore, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, State of New York, State of North Carolina, State of Rhode Island and State of Vermont in 11-1302, Intervenor for Respondent City of New York in 11-1315, 11-1323, Intervenors for Respondent City of New York, Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont in 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362,

DATE	PROCEEDINGS
	11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Heller, Simon)
4/2/12	FORM 72 submitted by on behalf of Petitioner EME Homer City Generation, L.P. in 11-1302, Petitioners Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC and Oak Grove Management Company, LLC in 11-1315, Petitioner GenOn Energy, Inc. in 11-1323, Petitioner National Mining Association in 11-1357, Petitioners American Coal Company, American Energy Corporation, Kenamerican

DATE	PROCEEDINGS
	Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Petitioner Entergy Corporation in 11-1360, Petitioner Midwest Ozone Group in 11-1362, Petitioner Lafayette Utilities System in 11-1361, Petitioner Peabody Energy Corporation in 11-1366, Petitioner Louisiana Chemical Association in 11-1365, Petitioner Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, Petitioner United Mine Workers of America in 11-1371, Petitioners AEP Texas North Company, Appalachian Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Petitioners Kansas City Board of Public Utilities, Kansas Gas and Electric Company and Sunflower Electric Power Corporation in 11-1374, Petitioner Southwestern Public Service Company in 11-1375, Petitioner Northern States Power Company (a Minnesota corporation) in 11-1376, Petitioner Municipal Electric Authority of Georgia in 11-1379, Petitioner National Rural Electric Cooperative Association in 11-1381, Petitioner Consolidated Edison Company of New York, Inc. in 11-1388, Petitioner Sunbury Generation LP in 11-1382, Petitioner

DATE	PROCEEDINGS
	ARIPPA in 11-1383, Petitioner East Kentucky Power Cooperative, Inc. in 11-1384, Petitioner CPI USA North Carolina LLC in 11-1385, Petitioners Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, Petitioner DTE Stoneman, LLC in 11-1391, Petitioner International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Petitioner Dairyland Power Cooperative in 11-1394, Petitioner Environmental Energy Alliance of New York, LLC in 11-1395. Arguing Person Information Updated for: Peter Douglas Keisler [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
4/2/12	CLERK'S ORDER filed [1366787], on the court's own motion, that the oral argument in these consolidated cases, scheduled for April 13, 2012, beginning at 9:30 a.m., are now scheduled to be heard in the Ceremonial

DATE	PROCEEDINGS
	Courtroom on the sixth floor. This location is a change from the courtroom previously announced. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
4/2/12	FORM 72 submitted by arguing attorney, Sean H. Donahue, on behalf of Intervenors for Respondent American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Donahue, Sean)
4/13/12	ORAL ARGUMENT HELD before Judges Rogers, Griffith and Kavanaugh. [11-1302,

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	11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
5/9/12	TRANSCRIPT [1372982] of oral argument [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
5/16/12	NOTICE FILED [1373919] by Environmental Defense Fund in 11-1302 to withdraw attorney David T. Lifland who represented Environmental Defense Fund in 11-1302 [Service Date: 05/16/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-

DATE	PROCEEDINGS
	1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lifland, David)
6/14/12	LETTER FILED [1378798] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 pursuant to FRAP 28j advising of additional authorities [Service Date: 06/14/2012] [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
6/26/12	LETTER FILED [1380807] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining

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	Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC pursuant to FRAP 28j advising of additional authorities [Service Date: 06/26/2012] [11-1315] (Webster, Timothy)
6/29/12	LETTER FILED [1381352] by Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Comopany, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC pursuant to FRAP 28j advising of additional authorities [Service Date: 06/29/2012] [11-1315] (Webster, Timothy)
7/3/12	RESPONSE FILED [1381841] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-

DATE	PROCEEDINGS
	1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to letter Rule 28j authorities [1381352-2], letter [1381352-3], letter Rule 28j authorities [1380807-2], letter [1380807-3] [Service Date: 07/03/2012 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Lipshultz, Jon)
8/2/12	LETTER FILED [1387276] by State of Kansas in 11-1329 pursuant to FRAP 28j advising of additional authorities [Service Date: 08/02/2012] [11-1329] (Nickel, Henry)
8/7/12	INCORRECT DOCKET ENTRY-DISREGARD—NOTICE FILED [1388001] by National Mining Association to withdraw attorney Tameka Meshaun Collier who represented National Mining Association in 11-1357 [Service Date: 08/07/2012] [11-1357]—[Edited 08/08/2012 by LMF] (Collier, Tameka)

DATE	PROCEEDINGS
8/8/12	NOTICE FILED [1388036] by National Mining Association to withdraw attorney Tameka Meshaun Collier who represented National Mining Association in 11-1357 [Service Date: 08/08/2012] [11-1357] (Collier, Tameka)
8/8/12	RESPONSE FILED [1388174] by EPA in 11-1302, EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 to letter Rule 28j authorities [1387276-2], letter [1387276-3] [Service Date: 08/08/2012 by CM/ECF NDA] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)

DATE	PROCEEDINGS
8/21/12	PER CURIAM JUDGMENT filed [1390310] that the Transport Rule and the Transport Rule FIPs be vacated and this proceeding be remanded to EPA, in accordance with the opinion of the court filed herein this date. EPA must continue administering CAIR pending the promulgation of a valid replacement for the reasons in the accompanying opinion. Before Judges: Rogers, Griffith and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
8/21/12	OPINION filed [1390314] (Pages: 60) for the Court by Judge Kavanaugh, DISSENTING OPINION (Pages: 44) by Judge Rogers [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-

DATE	PROCEEDINGS
	1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
8/21/12	CLERK'S ORDER filed [1390316] withholding issuance of the mandate. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
8/27/12	FIRST CLASS MAIL RETURNED [1391671] marked "Return to Sender—Unable to Forward". Mail had been sent to Attorney Donald James Trahan, Esquire for Petitioner Louisiana Department of Environmental Quality. [11-1364]
9/20/12	ENTRY OF APPEARANCE filed [1395650] by James D. Coots on behalf of Petitioner State of Georgia in 11-1367. [11-1367, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-

DATE	PROCEEDINGS
	1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (DeShazo, Diane)
9/20/12	NOTICE FILED [1395680] by State of Georgia in 11-1367 to withdraw attorney Diane Lea DeShazo who represented State of Georgia in 11-1367 [Service Date: 09/20/2012] [11-1367, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (DeShazo, Diane)
10/5/12	PETITION filed [1398305] by Respondent EPA in 11-1302, Respondents EPA and Lisa Perez Jackson in 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377, 11-1379, 11-1380, 11-1381, 11-1388, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394, 11-1395 for rehearing en banc. [Service Date: 10/05/2012 by CM/ECF NDA] Pages:

DATE	PROCEEDINGS
	11-15. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Rave, Norman)
10/5/12	PETITION filed [1398479] by Intervenors for Respondent City of Bridgeport, Connecticut, City of Chicago, City of New York, City of Philadelphia, Commonwealth of Massachusetts, DC, Mayor and City Council of Baltimore, State of Connecticut, State of Delaware, State of Illinois, State of Maryland, State of New York, State of North Carolina, State of Rhode Island and State of Vermont in 11-1302, Intervenor for Respondent City of New York in 11-1315, 11-1323, Intervenors for Respondent City of New York, Commonwealth of Massachusetts, DC, State of Connecticut, State of Delaware, State of Maryland, State of Rhode Island and State of Vermont in 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1362, 11-1363, 11-1361, 11-1364, 11-1367, 11-1366, 11-1365, 11-1373, 11-1368, 11-1371, 11-1369, 11-1374, 11-1375, 11-1378, 11-1376, 11-1377,

DATE	PROCEEDINGS
	11-1379, 11-1380, 11-1381, 11-1372, 11-1387, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1392, 11-1389, 11-1391, 11-1390, 11-1393, 11-1394 for rehearing en banc. [Service Date: 10/05/2012 by CM/ECF NDA] Pages: 11-15. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]— [Edited 10/09/2012 by LMC-Relief Replaced] (Bernstein, Marc)
10/5/12	PETITION filed [1398501] by Intervenors for Respondent American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council and Sierra Club in 11-1302 for rehearing en banc., for rehearing [Service Date: 10/05/2012 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-

DATE	PROCEEDINGS
	1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]—[Edited 10/09/2012 by LMC—Relief Replaced] (Donahue, Sean)
10/5/12	PETITION filed [1398519] by Intervenors for Respondent Calpine Corporation and Exelon Corporation in 11-1302 for rehearing en banc. [Service Date: 10/05/2012 by CM/ECF NDA] Pages: 21-30. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Collins, Brendan)
10/12/12	CLERK'S ORDER filed [1399386] Upon consideration of the petition of intervenors American Lung Association, et al. for panel rehearing and rehearing en banc, and the petitions of respondent EPA, the States of North Carolina, et al., and Industry Respondent Intervenors Calpine Corp., et al. for rehearing en banc, it is ORDERED that, within 15 days from date of this order, the State and Local Governmental petitioners file a combined response to the petitions, the

DATE	PROCEEDINGS
	Industry and Labor Non-Governmental petitioners file a combined response to the petitions, and the intervenor for petitioners file a combined response to the petitions. Each response may not exceed 20 pages. Absent further order of the court, no replies to the responses will be accepted. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
10/16/12	NOTICE FILED [1399983] by State of Ohio in 11-1392 to withdraw attorney Chris Kim who represented State of Ohio in 11-1392 [Service Date: 10/16/2012] [11-1392, 11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1393, 11-1394, 11-1395] (Kim, Chris)

DATE	PROCEEDINGS
10/17/12	UNOPPOSED MOTION filed [1400049] by San Miguel Electric Cooperative and EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Company, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Wisconsin Electric Power Company in 11-1363, Lafayette Utilities System in 11-1361,

DATE	PROCEEDINGS
	Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of Louisiana in 11-1364, State of Georgia in 11-1367, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, City of Springfield, Illinois, Office of Public Utilities in 11-1368, United Mine Workers of America in 11-1371, AEP Texas North Company, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, City of Ames, Iowa in 11-1378, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-

DATE	PROCEEDINGS
	1381, Consolidated Edison Company of New York, Inc. in 11-1388, State of Indiana in 11-1372, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International Brotherhood of Electrical Workers, AFL-CIO in 11-1390, State of Wisconsin in 11-1393, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 to extend time to file response to 11/16/2012. [Service Date: 10/17/2012] Pages: 1-10. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391,

DATE	PROCEEDINGS
	11-1392, 11-1393, 11-1394, 11-1395] (Webster, Timothy)
10/17/12	CLERK'S ORDER filed [1400128] Upon consideration of the unopposed motion to extend time to file responses to petition for rehearing and petitions for rehearing en banc, it is ORDERED that the motion to extend time be granted. The responses of the petitioners and the petitioner-intervenor to the petitions are now due November 16, 2012. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
11/16/12	RESPONSE FILED [1405397] by State of Kansas in 11-1329, Public Utility Commission of Texas, Railroad Commission of Texas, State of Texas, Texas Commission on Environmental Quality and Texas General Land Office in 11-1338, State of Alabama, State of Florida, State of Nebraska, State of Oklahoma, State of South Carolina, State of Texas and State of Virginia in 11-1340, Louisiana Department of Environmental Quality, Louisiana Public Service Commission and State of

DATE	PROCEEDINGS
	Louisiana in 11-1364, State of Georgia in 11-1367, City of Springfield, Illinois, Office of Public Utilities in 11-1368, City of Ames, Iowa in 11-1378, State of Indiana in 11-1372, Mississippi Public Service Commission and State of Michigan in 11-1386, State of Ohio in 11-1392, State of Wisconsin in 11-1393 to petition for rehearing en banc [1398519-2], petition for rehearing [1398501-3], petition for rehearing en banc [1398501-4], petition for rehearing en banc [1398479-3], petition for rehearing en banc [1398305-2] [Service Date: 11/16/2012 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Davis, Bill)
11/16/12	RESPONSE FILED [1405502] by San Miguel Electric Cooperative in 11-1302 to petition for rehearing en banc [1398519-2], petition for rehearing [1398501-3], petition for rehearing en banc [1398501-4], petition for rehearing en banc [1398479-3], petition for rehearing en banc [1398305-2] [Service Date:

DATE	PROCEEDINGS
	11/16/2012 by US Mail, Hand Delivery, CM/ ECF NDA] Pages: 11-15. [11-1302, 11-1338] (Nasi, Michael)
11/16/12	RESPONSE FILED [1405544] by EME Homer City Generation, L.P. in 11-1302, Big Brown Lignite Company, LLC, Big Brown Paper Company, LLC, Luminant Big Brown Mining Company, LLC, Luminant Energy Company, LLC, Luminant Generation Company, LLC, Luminant Holding Company, LLC, Luminant Mining Company, LLC, Oak Grove Management Company, LLC and Sandow Power Company, LLC in 11-1315, GenOn Energy, Inc. in 11-1323, Wisconsin Public Service Corporation in 11-1350, National Mining Association in 11-1357, Utility Air Regulatory Group in 11-1358, American Coal Company, American Energy Corporation, Kenamerican Resources, Inc., Murray Energy Corporation, Ohio Valley Coal Company, OhioAmerican Energy, Incorporated and UtahAmerican Energy, Inc. in 11-1359, Entergy Corporation in 11-1360, Midwest Ozone Group in 11-1362, Lafayette Utilities System in 11-1361, Peabody Energy Corporation in 11-1366, Louisiana Chemical Association in 11-1365, Environmental Committee of the Florida Electric Power Coordinating Group, Inc. in 11-1373, United Mine Workers of America in 11-1371, AEP Texas North Com-

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pany, Appalachian Power Company, Columbus Southern Power Company, Indiana Michigan Power Company, Kentucky Power Company, Ohio Power Company, Public Service Company of Oklahoma and Southwestern Electric Power Company in 11-1369, Kansas City Board of Public Utilities, Kansas Gas and Electric Company, Sunflower Electric Power Corporation and Westar Energy, Inc. in 11-1374, Southwestern Public Service Company in 11-1375, Northern States Power Company (a Minnesota corporation) in 11-1376, Midwest Food Processors Association, Wisconsin Cast Metals Association, Wisconsin Manufacturers and Commerce and Wisconsin Paper Council, Inc. in 11-1377, Municipal Electric Authority of Georgia in 11-1379, South Mississippi Electric Power Association in 11-1380, National Rural Electric Cooperative Association in 11-1381, Consolidated Edison Company of New York, Inc. in 11-1388, Western Farmers Electric Cooperative in 11-1387, Sunbury Generation LP in 11-1382, ARIPPA in 11-1383, East Kentucky Power Cooperative, Inc. in 11-1384, CPI USA North Carolina LLC in 11-1385, Alabama Power Company, Georgia Power Company, Gulf Power Company, Mississippi Power Company, Southern Company Services, Inc. and Southern Power Company in 11-1389, DTE Stoneman, LLC in 11-1391, International

DATE	PROCEEDINGS
	Brotherhood of Electrical Workers, AFL-CIO in 11-1390, Dairyland Power Cooperative in 11-1394, Environmental Energy Alliance of New York, LLC in 11-1395 to petition for rehearing en banc [1398519-2], petition for rehearing [1398501-3], petition for rehearing en banc [1398501-4], petition for rehearing en banc [1398305-2], petition for rehearing en banc [1398479-3] [Service Date: 11/16/2012 by CM/ECF NDA] Pages: 16-20. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395] (Keisler, Peter)
1/24/13	PER CURIAM ORDER filed [1417011] denying petition for rehearing [1398501-3] Before Judges: Rogers*, Griffith and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384,

DATE	PROCEEDINGS
	11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]* Circuit Judge Rogers would grant the petition for panel rehearing.
1/24/13	PER CURIAM ORDER, En Banc, filed [1417012] denying petition for rehearing en banc [1398519-2], denying petition for rehearing en banc [1398501-4], denying petition for rehearing en banc [1398479-3], denying petition for rehearing en banc [1398305-2] Before Judges: Sentelle, Henderson*, Rogers, Tatel, Garland, Brown, Griffith and Kavanaugh. [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378, 11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]* Circuit Judge Henderson did not participate in this matter.
2/4/13	MANDATE ISSUED to Environmental Protection Agency [11-1302, 11-1315, 11-1323, 11-1329, 11-1338, 11-1340, 11-1350, 11-1357, 11-1358, 11-1359, 11-1360, 11-1361, 11-1362, 11-1363, 11-1364, 11-1365, 11-1366, 11-1367, 11-1368, 11-1369, 11-1371, 11-1372, 11-1373, 11-1374, 11-1375, 11-1376, 11-1377, 11-1378,

DATE	PROCEEDINGS
	11-1379, 11-1380, 11-1381, 11-1382, 11-1383, 11-1384, 11-1385, 11-1386, 11-1387, 11-1388, 11-1389, 11-1390, 11-1391, 11-1392, 11-1393, 11-1394, 11-1395]
2/26/13	FIRST CLASS MAIL RETURNED [1422586] marked "Return To Sender—Not Deliverable As Addressed—Unable to Forward". Mail had been sent to Attorney Mr. Tom Bates for Petitioner State of Oklahoma. [11-1340]
4/9/13	LETTER filed [1429813] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 03/29/2013 as No. 12-1183. [11-1302]
4/9/13	LETTER filed [1429815] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket on 03/29/2013 as No. 12-1182. [11-1302]
5/2/13	ENTRY OF APPEARANCE filed [1433902] by Kelly Murphy McQueen on behalf of Petitioner Entergy Corporation. [11-1360] (Berge, Megan)
6/24/13	LETTER filed [1444712] by the Clerk of the Supreme Court of the United States notifying

DATE	PROCEEDINGS
	this court of the following activity in the case before it: The petition for writ of certiorari was granted on 06/24/2013. [11-1302
6/24/13	LETTER filed [1444713] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: The petition for writ of certiorari was granted on 06/24/2013. [11-1302]

Air Quality Modeling
Final Rule Technical Support Document

U.S. Environmental Protection Agency
Office of Air Quality Planning and Standards
Air Quality Assessment Division
Research Triangle Park, NC 27711

June 2011

Air Quality Modeling Final Rule
Technical Support Document

Appendix F

Analysis of Contribution Thresholds

Table F-1a. Contribution metrics for 8-hour ozone 2012 nonattainment receptors – part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution (ppb)	2012 Total Contribution from All Upwind States (ppb)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
220330003	LA	East Baton Rouge	39.8	21.0	35%	10	6	1
480391004	TX	Brazoria	35.3	27.6	44%	12	10	1
482010051	TX	Harris	27.3	26.9	50%	11	9	1
482010055	TX	Harris	29.6	29.1	50%	12	9	2

Table F-1b. Contribution metrics for 8-hour ozone 2012 nonattainment receptors – part 2.

Monitoring Site	State	County	Transport (ppb) Using 0.5% Threshold	Transport (ppb) Using 1% Threshold	Transport (ppb) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
220330003	LA	East Baton Rouge	17.8	15.7	4.0	85%	75%	19%
480391004	TX	Brazoria	24.5	23.3	7.9	89%	84%	29%
482010051	TX	Harris	24.2	23.2	7.3	90%	86%	27%
482010055	TX	Harris	26.6	25.1	12.1	91%	86%	42%

Table F-1c Contribution metrics for 8-hour ozone 2012 maintenance receptors part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution (ppb)	2012 Total Contribution from All Upwind States (ppb)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
90011123	CT	Fairfield	5.7	56.9	91%	19	11	3
90093002	CT	New Haven	4.4	59.6	93%	15	10	4
240251001	MD	Harford	33.7	32.7	49%	13	10	2
260050003	MI	Allegan	4.3	56.9	93%	11	9	3
482010029	TX	Harris	35.0	21.9	38%	8	6	1
482011050	TX	Harris	33.1	29.7	47%	15	8	1

Table F-1d. Contribution metrics for 8-hour ozone 2012 maintenance receptors - part 2.

Monitoring Site	State	County	Transport (ppb) Using 0.5% Threshold	Transport (ppb) Using 1% Threshold	Transport (ppb) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
90011123	CT	Fairfield	53.9	49.3	36.0	95%	87%	63%
90093002	CT	New Haven	57.3	54.2	42.0	96%	91%	71%
240251001	MD	Harford	28.2	26.4	13.8	86%	81%	42%
260050003	MI	Allegan	53.7	52.3	41.1	94%	92%	72%
482010029	TX	Harris	19.4	18.0	5.8	89%	82%	27%
482011050	TX	Harris	27.1	22.9	11.1	91%	77%	37%

Table F-2a. Contribution metrics for annual PM2.5 2012 nonattainment receptors - part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution ($\mu g/m^3$)	2012 Total Contribution from All Upwind States ($\mu g/m^3$)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
10730023	AL	Jefferson	3.12	2.72	47%	12	5	0
10732003	AL	Jefferson	2.58	2.85	52%	14	6	0
131210039	GA	Fulton	1.37	3.43	72%	13	10	0
171191007	IL	Madison	1.51	4.92	77%	17	9	1
261630033	MI	Wayne	2.27	4.12	64%	13	7	1
390350038	OH	Cuyahoga	2.62	4.24	62%	12	9	0
390350045	OH	Cuyahoga	2.64	4.28	62%	13	9	0
390350060	OH	Cuyahoga	2.64	4.29	62%	13	9	0
390610014	OH	Hamilton	2.13	5.43	72%	13	10	2
390610042	OH	Hamilton	2.04	5.55	73%	13	9	2
390618001	OH	Hamilton	2.11	5.39	72%	13	10	2
420030064	PA	Allegheny	2.14	4.99	70%	14	8	2

Table F-2b. Contribution metrics for annual PM2.5 2012 nonattainment receptors – part 2

Monitoring Site	State	County	Transport ($\mu g/m^3$) Using 0.5% Threshold	Transport ($\mu g/m^3$) Using 1% Threshold	Transport ($\mu g/m^3$) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
10730023	AL	Jefferson	2.24	1.45	0.00	82%	53%	0%
10732003	AL	Jefferson	2.49	1.67	0.00	87%	59%	0%
131210039	GA	Fulton	2.94	2.64	0.00	86%	77%	0%
171191007	IL	Madison	4.57	3.72	1.22	93%	76%	25%
261630033	MI	Wayne	3.75	3.10	0.99	91%	75%	24%
390350038	OH	Cuyahoga	3.71	3.40	0.00	88%	80%	0%
390350045	OH	Cuyahoga	3.82	3.43	0.00	89%	80%	0%
390350060	OH	Cuyahoga	3.83	3.43	0.00	89%	80%	0%
390610014	OH	Hamilton	4.89	4.57	2.09	90%	84%	39%
390610042	OH	Hamilton	5.02	4.57	2.28	91%	82%	41%
390618001	OH	Hamilton	4.87	4.55	2.07	90%	84%	38%
420030064	PA	Allegheny	4.62	3.98	2.29	92%	80%	46%

Table F-2c. Contribution metrics for annual PM2.5 2012 maintenance receptors – part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution ($\mu g/m^3$)	2012 Total Contribution from All Upwind States ($\mu g/m^3$)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
180970081	IN	Marion	2.94	4.78	62%	13	10	1
180970083	IN	Marion	2.94	4.79	62%	13	10	1
390350065	OH	Cuyahoga	2.64	4.28	62%	13	9	0
390617001	OH	Hamilton	2.12	5.42	72%	13	10	2

Table F-2d. Contribution metrics for annual PM2.5 2012 maintenance receptors – part 2.

Monitoring Site	State	County	Transport ($\mu g/m^3$) Using 0.5% Threshold	Transport ($\mu g/m^3$) Using 1% Threshold	Transport ($\mu g/m^3$) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
180970081	IN	Marion	4.24	3.92	0.94	89%	82%	20%
180970083	IN	Marion	4.25	3.93	0.94	89%	82%	20%
390350065	OH	Cuyahoga	3.82	3.43	0.00	89%	80%	0%
390617001	OH	Hamilton	4.88	4.56	2.08	90%	84%	38%

Table F-3a. Contribution metrics for 24-hour PM2.5 2012 nonattainment receptors part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution ($\mu g/m^3$)	2012 Total Contribution from All Upwind States ($\mu g/m^3$)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
10730023	AL	Jefferson	6.81	7.87	54%	12	7	0
170311016	IL	Cook	4.75	12.55	73%	13	9	1
171191007	IL	Madison	4.03	17.06	81%	14	11	3
180970043	IN	Marion	9.15	14.19	61%	9	8	2
180970066	IN	Marion	8.39	13.75	62%	10	8	2
180970081	IN	Marion	8.29	13.73	62%	10	8	2
261470005	MI	St Clair	1.97	15.28	89%	12	9	2
261630015	MI	Wayne	4.35	13.97	76%	12	8	2
261630016	MI	Wayne	5.22	13.20	72%	10	7	2
261630019	MI	Wayne	3.58	12.89	78%	10	8	2
261630033	MI	Wayne	5.03	13.59	73%	12	9	2
390350038	OH	Cuyahoga	8.49	12.86	60%	14	8	4
390350060	OH	Cuyahoga	8.96	11.58	56%	11	7	3
420030064	PA	Allegheny	5.53	14.93	73%	9	7	2
420030093	PA	Allegheny	3.21	12.05	79%	11	6	2
420030116	PA	Allegheny	2.96	13.19	82%	10	7	2
420070014	PA	Beaver	2.61	13.51	84%	12	7	2
420710007	PA	Lancaster	6.69	10.45	61%	15	7	1
540090011	WV	Brooke	3.28	15.33	82%	12	6	2
550790043	WI	Milwaukee	3.00	17.74	86%	14	10	3

Table F-3b. Contribution metrics for 24-hour PM2.5 2012 nonattainment receptors – part 2.

Monitoring Site	State	County	Transport ($\mu g/m^3$) Using 0.5% Threshold	Transport ($\mu g/m^3$) Using 1% Threshold	Transport ($\mu g/m^3$) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
10730023	AL	Jefferson	7.16	5.92	0.00	91%	75%	0%
170311016	IL	Cook	11.51	10.56	3.29	92%	84%	26%
171191007	IL	Madison	15.91	15.14	9.15	93%	89%	54%
180970043	IN	Marion	13.10	12.85	7.04	92%	91%	50%
180970066	IN	Marion	12.75	12.26	6.47	93%	89%	47%
180970081	IN	Marion	12.73	12.22	6.39	93%	89%	47%
261470005	MI	St Clair	14.35	13.65	6.95	94%	89%	46%
261630015	MI	Wayne	12.93	11.80	6.41	93%	85%	46%
261630016	MI	Wayne	12.27	11.50	6.17	93%	87%	47%
261630019	MI	Wayne	12.04	11.60	6.11	93%	90%	47%
261630033	MI	Wayne	12.53	11.67	6.42	92%	86%	47%
390350038	OH	Cuyahoga	12.33	10.83	8.45	96%	84%	66%
390350060	OH	Cuyahoga	10.55	9.60	5.78	91%	83%	50%
420030064	PA	Allegheny	13.73	13.31	8.83	92%	89%	59%
420030093	PA	Allegheny	11.09	9.65	6.03	92%	80%	50%
420030116	PA	Allegheny	12.04	11.14	6.84	91%	85%	52%
420070014	PA	Beaver	12.38	11.05	6.57	92%	82%	49%
420710007	PA	Lancaster	9.34	7.38	2.83	89%	71%	27%
540090011	WV	Brooke	14.56	12.91	8.70	95%	84%	57%
550790043	WI	Milwaukee	16.66	15.65	9.69	94%	88%	55%

Table F-3c. Contribution metrics for 24-hour PM2.5 2012 maintenance receptors part 1.

Monitoring Site	State	County	2012 Base Case In-State Contribution (µg/m3)	2012 Total Contribution from All Upwind States (µg/m3)	Upwind Contribution as a Percent of Receptor Concentration	# States Contributing At or Above 0.5% Threshold	# States Contributing At or Above 1% Threshold	# States Contributing At or Above 5% Threshold
10732003	AL	Jefferson	4.61	6.88	60%	11	7	0
170310052	IL	Cook	6.13	12.66	67%	13	10	1
170312001	IL	Cook	3.96	13.57	77%	11	9	2
170313301	IL	Cook	5.10	12.23	71%	11	9	2
170316005	IL	Cook	6.15	11.15	65%	16	8	1
171190023	IL	Madison	3.87	16.65	81%	15	9	4
180890022	IN	Lake	5.77	9.84	63%	10	9	1
180890026	IN	Lake	4.52	11.65	72%	12	9	2
261610008	MI	Washtenaw	2.67	15.18	85%	13	10	2
390170003	OH	Butler	5.90	18.03	75%	13	9	2
390350045	OH	Cuyahoga	9.04	11.81	57%	12	7	3
390350065	OH	Cuyahoga	8.51	12.53	60%	12	8	3
390618001	OH	Hamilton	5.88	14.19	71%	12	8	3
390811001	OH	Jefferson	5.09	11.36	69%	11	6	2
391130032	OH	Montgomery	4.93	15.19	76%	13	9	2
420031008	PA	Allegheny	4.23	14.80	78%	11	7	3
420031301	PA	Allegheny	4.31	12.29	74%	9	6	2
420033007	PA	Allegheny	4.26	11.46	73%	9	6	2
421330008	PA	York	8.98	13.25	60%	17	11	1
550790010	WI	Milwaukee	4.26	18.62	81%	13	12	2
550790026	WI	Milwaukee	4.03	15.17	79%	13	11	2

Table F-3d. Contribution metrics for 24-hour PM2.5 2012 maintenance receptors – part 2.

Monitoring Site	State	County	Transport ($\mu g/m^3$) Using 0.5% Threshold	Transport ($\mu g/m^3$) Using 1% Threshold	Transport ($\mu g/m^3$) Using 5% Threshold	% of Total Transport Captured with 0.5% Threshold	% of Total Transport Captured with 1% Threshold	% of Total Transport Captured with 5% Threshold
10732003	AL	Jefferson	6.19	5.23	0.00	90%	76%	0%
170310052	IL	Cook	11.67	10.96	2.84	92%	87%	22%
170312001	IL	Cook	12.56	12.13	6.70	93%	89%	49%
170313301	IL	Cook	11.13	10.69	5.17	91%	87%	42%
170316005	IL	Cook	10.37	8.42	2.49	93%	76%	22%
171190023	IL	Madison	15.81	14.31	10.90	95%	86%	66%
180890022	IN	Lake	8.88	8.68	3.09	90%	88%	31%
180890026	IN	Lake	10.73	10.19	4.68	92%	88%	40%
261610008	MI	Washtenaw	14.12	13.46	7.37	93%	89%	49%
390170003	OH	Butler	17.27	16.25	8.73	96%	90%	48%
390350045	OH	Cuyahoga	11.05	9.87	5.94	94%	84%	50%
390350065	OH	Cuyahoga	11.66	10.57	6.28	93%	84%	50%
390618001	OH	Hamilton	13.28	12.30	7.97	94%	87%	56%
390811001	OH	Jefferson	10.63	9.50	5.45	94%	84%	48%
391130032	OH	Montgomery	14.41	13.42	7.05	95%	88%	46%
420031008	PA	Allegheny	13.86	12.92	9.84	94%	87%	67%
420031301	PA	Allegheny	11.39	10.78	7.09	93%	88%	58%
420033007	PA	Allegheny	10.71	10.12	6.97	94%	88%	61%
421330008	PA	York	12.02	10.65	2.11	91%	80%	16%
550790010	WI	Milwaukee	17.80	17.61	8.60	96%	95%	46%
550790026	WI	Milwaukee	14.21	13.56	6.10	94%	89%	40%

[SEAL OMITTED]

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RESEARCH TRIANGLE PARK, NC 27711

[Aug. 15 2006]

OFFICE OF
AIR QUALITY PLANNING
AND STANDARDS

MEMORANDUM

SUBJECT: Guidance for State Implementation Plan (SIP) Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards

FROM: William T. Harnett, Director
/s/ William T. Harnett

Air Quality Policy Division, OAQPS (C539-01)

TO: Regional Air Division Director, Regions I-X

The purpose of this memorandum is to provide guidance concerning the State implementation plan (SIP) submissions States should make to meet their currently outstanding obligations under section 110(a)(2)(D)(i).

The Environmental Protection Agency (EPA) has previously indicated through rulemaking what States affected by the Clean Air Interstate Rule (CAIR) must do concerning emissions that significantly contribute to nonattainment or interfere with maintenance of the 8-hour ozone or fine particulates ($PM_{2.5}$) National Ambient Air Quality Standard (NAAQS) in another State. This guidance, therefore, addresses what States that are not affected by the CAIR should consider in meeting the "significant contribution" and "interfere with maintenance" requirements of section 110(a)(2)(D)(i), and what all States (inside or outside the CAIR region) should consider with respect to making submissions to meet the "prevention of significant deterioration" and "protect visibility" requirements of section 110(a)(2)(D)(i). Because the CAIR region differs for purposes of 8-hour ozone and $PM_{2.5}$, some States may be within the CAIR region for purposes of one NAAQS, but not the other, and should make section 110(a)(2)(D)(i) SIP submissions that account for this distinction.

On July 18, 1997, EPA promulgated NAAQS for ozone and for fine particulate matter. Section 110(a)(1) of the Clean Air Act requires States to submit new SIPs to provide for the implementation, maintenance, and enforcement of new or revised NAAQS. Section 110(a)(2) lists the elements that the new SIP submissions must contain. Among other things, SIPs for new or revised NAAQS must contain adequate provisions to address interstate transport of air pollution, pursuant to section 110(a)(2)(D)(i).

Section 110(a)(1) explicitly provides that States must adopt and submit to the EPA Administrator new SIP submissions within 3 years after the promulgation of a new or revised NAAQS, meeting the provisions of 110(a)(2), as applicable. Therefore, States should have submitted SIPs to EPA for the 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS by no later than July 2000. However, at this time no State has submitted a new SIP. We recognize that litigation over both the 8-hour ozone NAAQS and the $PM_{2.5}$ NAAQS created substantial uncertainty as to how to proceed. Moreover, in the case of $PM_{2.5}$, additional time was needed for creation of a monitoring network, collection of at least three years of data, and analysis of those data.

On April 25, 2005, EPA published an action in the Federal Register making a finding that States had failed to make statutorily required SIP submissions for the 8-hour ozone and $PM_{2.5}$ NAAQS. The EPA explicitly limited this finding of failure to submit to the requirements of section 110(a)(2)(D)(i) pertaining to interstate transport. The finding of failure to submit action started a 24-month clock for EPA to issue a final Federal Implementation Plan (FIP) to meet the requirements of section 110(a)(2)(D)(i), for both the 8-hour ozone and $PM_{2.5}$ standards, unless EPA instead approves a State SIP submission to meet those requirements in advance of that date.

The finding of failure to submit SIPs addressing section 110(a)(2)(D)(i) is the first action required under a Consent Decree between EPA and plaintiffs who sued the Agency for failure to take action to require

the submission of new SIPs for the 8-hour ozone and $PM_{2.5}$ NAAQS, or to issue FIPs in lieu thereof. The EPA has also committed in the Consent Decree to take later actions to determine whether States have submitted the remaining SIP elements required by section 110(a)(1) and (2) for the 8-hour ozone and $PM_{2.5}$ NAAQS by no later than December 15, 2007, for ozone, and by no later than October 5, 2008, for $PM_{2.5}$. The Agency intends to provide States with additional information concerning the remaining section 110(a)(1) and (2) SIP elements, in separate regulations or guidance documents.

We emphasize that this document is merely guidance and that States or EPA may elect to follow or deviate from this guidance, as appropriate. The ultimate determination of whether a given SIP submission by a State meets the statutory requirements of section 110(a)(2)(D)(i) will be accomplished through case by case notice and comment rulemaking in which the facts and circumstances of each State submission will be evaluated by EPA. We ask that the EPA Regional Offices work with their respective States in the development of their SIP submissions.

If you have questions concerning this guidance, please contact Mr. Larry D. Wallace (919) 541-0906. Please ensure that the appropriate air agency officials for the States in your Region are made aware of this guidance.

Attachment

cc: Margo Oge, OTAQ
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Guidance for State Implementation Plan Submissions to Meet Current Outstanding Obligations Under Section 110(a)(2)(D)(i) for the 8-Hour Ozone and $PM_{2.5}$ National Ambient Air Quality Standards

1. Introduction:

This document provides guidance to States concerning State Implementation Plan (SIP) submissions that States must make pursuant to section 110(a)(2)(D)(i). The Environmental Protection Agency (EPA) emphasizes that this guidance document merely provides suggestions and that States or EPA may elect to follow or deviate from this guidance, as appropriate. The ultimate determination of whether a given SIP submission by a State meets the requirements of section 110(a)(2)(D)(i) will be accomplished by area specific notice and comment rulemaking in which—the facts and circumstances of each State submission will be evaluated by EPA. Sections 110(a)(1) and (2) of the Clean Air Act (CAA), require States to submit SIPs that implement, maintain, and enforce a new or revised national ambient air quality standard (NAAQS) within 3 years following the promulgation of the standard.

In July 1997, EPA issued the 8-hour ozone and $PM_{2.5}$ NAAQS. States were thus required to submit SIPs that satisfy the applicable CAA requirements under section 110(a)(1) and (2) for these NAAQS by July 2000. Among the SIP elements identified in section 110(a)(2) is the requirement to address interstate transport of pollutants pursuant to section 110(a)(2)(D)(i). The EPA has determined that section

110(a)(2)(D)(i) is among the SIP requirements with which States must comply in accordance with the schedule of section 110(a)(1).[1]

On April 25, 2005, EPA notified States of their failure to make the required SIP submission addressing interstate transport of pollutants related to ozone and $PM_{2.5}$ in downwind States.[2]

Pursuant to section 110(c), EPA's April 25, 2005 finding of failure to submit started a 24-month clock for EPA to issue a final Federal Implementation Plan (FIP) to address the requirements of section 110(a)(2)(D)(i), unless a State makes the required submission and EPA approves such submission within that 24-month period. The 24-month FIP clock began on May 25, 2005, the effective date of the finding of failure to submit, and will end on May 25, 2007.

The EPA's finding of failure to submit SIPs that address section 110(a)(2)(D)(i) is the first action required under a Consent Decree.[3] Under the Consent

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[1] See, "Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_X SIP Call; Final Rule," 70 FR 25,162 at 25,263-69 (May 12, 2005).

[2] See, "Finding of Failure to Submit Section 110 State Implementation Plans for Interstate Transport for the National Ambient Air Quality Standards for 8-Hour Ozone and PM2.5," 70 FR 21,147 (April 25, 2005).

[3] The Consent Decree is between Environmental Defense and American Lung Association, as plaintiffs, and EPA, as defendant, signed March 10, 2005. The Consent Decree resolved the case entitled "Environmental Defense, et al. v. Johnson,"

Decree, EPA is also obligated to make later determinations as to whether States have made the required SIP submissions to meet the remaining applicable requirements of section 110(a)(1) and (2). The EPA is obligated to make these later determinations by December 15, 2007, for SIP submissions for the 8-hour ozone NAAQS, and by October 5, 2008, for SIP submissions pertaining to the $PM_{2.5}$ NAAQS.

The EPA believes that Section 110(a)(2)(D)(i) provides an important tool for attainment and maintenance of the NAAQS by addressing the problem of interstate transport of air pollutants. This provision applies to each pollutant covered by a NAAQS and to all areas of each State regardless of the attainment or nonattainment designation of such areas. Section 110(a)(2)(D)(i) specifically provides that each State's SIP must contain adequate provisions to prohibit air pollutant emissions from within the State that significantly contribute to nonattainment of the NAAQS, or that interfere with maintenance of the NAAQS, in any other State. In addition, this section requires that each State's SIP must contain adequate provisions to prohibit emissions of air pollutants within the State that interfere with measures required to prevent significant deterioration of air quality or to protect visibility in any other State.

The EPA intends to provide additional information to States concerning the remaining section 110(a)(1)

No. 1:05CV00493 (D.D.C.). EPA gave notice of, and took comment on, the proposed consent decree in accordance with CAA section 113(g). See, 70 FR 15,623 (March 28, 2005).

and (2) SIP elements, either in regulations implementing the 8-hour ozone or $PM_{2.5}$ NAAQS, or in later guidance documents.

2. What is required under section 110(a)(2)(D)(i):

Section 110(a)(1) requires States to make a SIP submission for a new or revised NAAQS within 3 years of promulgation of such new or revised NAAQS.

Section 110(a)(2) lists the elements those SIPs must contain. For example, this section lists certain SIP infrastructure elements related to the new or revised standards such as requirements for provisions pertaining to modeling, monitoring, and emissions inventories that are designed to assure attainment and maintenance of the standards. An important SIP element listed in section 110(a)(2) is the requirement that States address emissions that impact other States through interstate transport.

The "good neighbor" provisions in section 110(a)(2)(D)(i) require each State to submit a SIP that prohibits emissions that adversely affect another State in the ways contemplated in the statute. Section 110(a)(2)(D)(i) contains four distinct requirements related to the impacts of interstate transport. Each State must submit a SIP which contains adequate provisions:

> Prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State

> with respect to any . . . national primary or secondary air quality standard, or
>
> (II) interfere with measures required to be included in the applicable implementation plan for any other State . . . . to prevent significant deterioration of air quality or to protect visibility.

The EPA's April 25, 2005 finding of failure to submit reflected EPA's determination that States had not yet made SIP submissions for the 8-hour ozone and $PM_{2.5}$ NAAQS necessary to meet the requirements of section 110(a)(2)(D)(i).

The precise nature and contents of such a submission is not stipulated in the statute. EPA believes that the contents of the SIP submission required by section 110(a)(2)(D)(i) may vary depending upon the facts and circumstances related to the specific NAAQS. In particular, the data and analytical tools available at the time the State develops and submits a SIP for a new or revised NAAQS necessarily affects the content of the required submission. In some instances, this submission may be more detailed and substantive, as when existing data and analyses already provide the requisite information. In other instances, the submission may be more preliminary and simplified, as when there is currently insufficient information to support a determination that there are interstate transport impacts, or when other later regulatory actions are prerequisites to making such a determination.

The sections below provide guidance concerning the types of SIP submissions that EPA believes would be appropriate in response to the April 25, 2005, finding of failure to submit.

3. States subject to the Clean Air Interstate Rule:

In March of 2005, EPA promulgated the Clean Air Interstate Rule (CAIR).[4] Based upon the requirements of section 110(a)(2)(D)(i), EPA determined in the CAIR that NO_X emissions from sources in 25 States and the District of Columbia contribute significantly to nonattainment and interfere with maintenance of the 8-hour ozone standard in other downwind States. The EPA also determined that SO_2 and NO_X emissions from sources in 23 States and the District of Columbia contribute significantly to nonattainment and interfere with maintenance of the PM2.5 standards in other downwind States. Subsequently, EPA determined that two additional States contribute to nonattainment and interfere with maintenance of the $PM_{2.5}$ NAAQS.[5] (See Attachment A listing the States subject to the CAIR).

In the CAIR, EPA concluded that the States will meet their section 110(a)(2)(D)(i) obligations to address the "significant contribution" and "interference with maintenance" requirements by complying with the CAIR requirements. Consequently, States within the CAIR region need not submit a separate SIP revi-

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[4] See, supra note 1.

[5] See, Inclusion of Delaware and New Jersey in Clean Air Interstate Rule, 71 FR 25288 (April 28, 2006).

sion to satisfy the section 110(a)(2)(D)(i) requirements provided that they submit a SIP revision to satisfy CAIR.

Pursuant to section 110(a)(1), those States not within the CAIR region must also make a submission with respect to those two requirements. Also in accordance with the statute, all States, both inside and outside the CAIR region must make a submission with respect to the "prevention of significant deterioration" and "protect visibility" requirements of section 110(a)(2)(D)(i). It should be noted that because the CAIR region differs for purposes of ozone and $PM_{2.5}$, some States may be inside the CAIR region for purposes of one NAAQS, but outside the CAIR region for the other, and should make section 110(a)(2)(D)(i) SIP submissions that account for this distinction.

Accordingly, EPA has structured this guidance to address the different types of considerations that States may need to evaluate in making their respective submissions.

4. SIP Submissions from States pertaining to the "significant contribution" and "interfere with maintenance" requirements of section 110(a)(2)(D)(i):

States not covered by the CAIR must make a section 110(a)(2)(D)(i) SIP submission addressing significant contribution to nonattainment and interference with maintenance of the 8-hour ozone and $PM_{2.5}$ NAAQS in any other States.

The EPA anticipates, based upon existing information developed in connection with the CAIR, that

emissions from sources in States not covered by the CAIR do not contribute significantly to nonattainment or interfere with maintenance of the 8-hour ozone or $PM_{2.5}$ NAAQS in any other State. Unless a State excluded from the CAIR has contrary information or analysis, EPA believes that such State should be able to make a relatively simple SIP submission verifying that the State does not significantly contribute to nonattainment or interfere with maintenance of the 8-hour ozone or $PM_{2.5}$ in another State. EPA believes that a negative declaration from each of the non-CAIR States, which certifies that the State in question does not significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another State, should be adequate to satisfy the requirements of section 110(a)(2)(D)(i).

States should submit a technical demonstration to support a negative declaration. EPA believes that this demonstration should contain the information which the State deems appropriate to support its claim that it does not significantly contribute to nonattainment or interfere with maintenance of the standards in another State. Suitable information might include, but is not be limited to, information concerning emissions in the State, meteorological conditions in the State, the distance to the nearest nonattainment area in another State, reliance on modeling conducted by EPA in determining that such State should not be included within the ambit of the CAIR, or such other information as the State considers probative on the issue of significant contribution and interference with maintenance. The EPA believes that it would be

appropriate for States to make this assessment using considerations comparable to those used by EPA in evaluating significant contribution in the CAIR, e.g., assessing the impacts of emissions on nearby nonattainment areas as of the year 2010, and evaluating mitigation strategies based upon emissions reductions achievable through highly cost effective controls.

In addition, States that are not subject to the CAIR, but are subject to the NO_x SIP Call, may wish to indicate that SIPs submitted to meet the NO_x SIP Call should be sufficient to satisfy the section 110(a)(2)(D)(i) obligation for the 8-hour ozone NAAQS. EPA initially addressed interstate transport for ozone in the NO_x SIP Call rule published in 1998.[6] The NO_x SIP Call is substantially reducing ozone transport, and is helping downwind areas meet the 8-hour ozone standards. The EPA believes that states outside the CAIR region that are meeting the NOx SIP Call should not significantly be contributing to nonattainment or interfering with maintenance in any downwind state.

The EPA will assist each State to evaluate the available information and to develop a sufficient SIP submission and demonstration to meet this element of section 110(a)(2)(D)(i). The EPA will take action on the SIP submissions made by States through notice

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[6] "Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for the Purposes of Reducing Regional Transport of Ozone Rule, (63 FR 57356, October 27, 1998).

and comment rulemaking, thereby assuring that the requirements are met.

5. SIP Submissions from States pertaining to the "prevention of significant deterioration" requirement of section 110(a)(2)(D)(i):

Section 110(a)(2)(D)(i)(II) also contains a requirement for all States to submit SIPs that contain adequate provisions prohibiting " . . . . . any source or other type of emission activity within the State from emitting any air pollutant in amounts which will—interfere with measures required to be included in the applicable implementation plan for any other State . . . . to prevent significant deterioration of air quality . . . "

Under EPA regulations, each SIP must include a preconstruction review program for major sources to satisfy the requirements of section 110(a)(2)(D)(i) of the Act. 40 C.F.R. § 51.165(b)(1). In nonattainment areas, the preconstruction review program is known as Nonattainment New Source Review (NNSR) and in attainment areas, preconstruction review is part of the Prevention of Significant Deterioration (PSD) program. These programs require preconstruction permits to protect the air quality within each state and also serve to prohibit construction of new major sources and major modifications at existing major sources from contributing to nonattainment in adjacent states. The PSD permitting program is also the primary measure that each SIP must include to prevent significant deterioration of air quality in accordance with Title I, Part C and section 110(a)(2)(D)(i)(II)

of the Act. See, 40 CFR § 51.166. Section 110(a)(2)(D)(i)(II) requires that SIPs contain adequate provisions prohibiting sources or emissions activity within each state "from emitting any air pollutant in amounts which will— . . . interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality. . . ." 42 U.S.C. § 7410(a)(2)(D)(i)(II).

Because all areas are currently subject to some form of preconstruction permitting program for ozone and $PM_{2.5}$, it is not necessary, at this time, for States to make a SIP submission containing rule changes or modeling demonstrations in order to address section 110(a)(2)(D)(i)(II) for the 8-hour ozone and $PM_{2.5}$ NAAQS. EPA has established or will establish schedules for SIP submissions that incorporate revisions to EPA's preconstruction permitting regulations that are specific to the 8-hour ozone and $PM_{2.5}$ NAAQS. Areas will need to revise their SIPs consistent with such schedules.

Each area of the country is currently subject to an equivalent PSD or NNSR permitting program for the 8-hour ozone standard and an interim PSD or NNSR permitting program for $PM_{2.5}$. If a particular state SIP lacks an approved PSD program, the PSD permitting requirements must be implemented in that state or local area through a federal PSD program that can be administered by the state or local permitting authority under a delegation agreement with EPA.

Where a state lacks an approved NNSR program, the state may issue NNSR permits pursuant to an EPA regulation at 40 CFR Part 51, Appendix S. If such a state lacks authority to issue permits consistent with appendix S, EPA is the permitting authority.

In April 2004 and November 2005, EPA promulgated regulations in two phases that addressed (among other topics) the implementation of the PSD and NNSR programs under the 8-hour ozone NAAQS. See 69 FR 23951 (Apr. 30, 2004); 70 Fed. Reg. 71612 (Nov. 29, 2005). The first phase of these rules requires implementation of NNSR in accordance with an area's 8-hour ozone classification after revocation of the 1-hour ozone NAAQS. See 69 FR at 23985. The EPA revoked the 1-hour ozone NAAQS on June 15, 2005. Thus, new and modified major sources of volatile organic compound and NO_x are currently subject to NNSR based on the designation and classification of the area in which they are located under the 8-hour ozone NAAQS. In an 8-hour ozone nonattainment area that currently has no approved nonattainment plan or otherwise lacks authority to implement nonattainment NSR for the 8-hour ozone NAAQS through a SIP-approved permitting program, permits for new and modified major stationary sources in such areas must be consistent with the requirements in appendix S of 40 CFR. Part 51. IEPA determined that states did not need to submit any revisions of their existing PSD programs to implement of the 8-hour ozone NAAQS, but the Agency simultaneously promulgated new rules to establish NOx as a precursor for ozone under the PSD program. See 68 FR. 32802, 32843-44

(Jun. 2, 2003); 70 FR at 71679. The EPA established June 15, 2007 as the deadline for states to provide SIP submissions that incorporate the requirements of the phase II ozone implementation rule into their PSD and NNSR programs. See 70 FR at 71683.

For $PM_{2.5}$, EPA has recommended that states employ an interim PM2.5 program that involves implementing existing PSD and NNSR programs for PM_{10} as a surrogate for the $PM_{2.5}$ requirements until the necessary tools are in place for states to adopt PSD and NNSR programs for $PM_{2.5}$. See, Memorandum from John Seitz, EPA OAQPS, "Interim Implementation for the New Source Review Requirements for PM2.5," (October 23, 1997); Memorandum from Steve Page, EPA OAQPS, "Implementation of New Source Review Requirements in PM2.5 Nonattainment Areas." (April 5, 2005). In November 2005, EPA has proposed regulations that establish the minimum requirements for PSD and NNSR programs for $PM_{2.5}$, 70 FR 65984, 66033 (Nov. 1, 2005), but the Agency has not promulgated final regulations on this subject. States are not required to submit PSD and NNSR program SIPs for $PM_{2.5}$ until EPA completes these regulations and finalizes the submission schedule, which we have proposed to be April 5, 2008. Until the submission date is established in EPA's final $PM_{2.5}$ implementation rule for NSR, states may continue to implement interim programs based on PM_{10} and need not provide PSD or NNSR program submissions containing rule changes for $PM_{2.5}$.

The air quality demonstrations required for issuance of a PSD and NNSR permit must be made for all areas that are potentially impacted by the emissions from a proposed source or modification requiring a permit. As a result, the implementation of a PSD and NNSR permitting program in each state serves to prevent significant deterioration in neighboring states and thus largely satisfies the requirements of section 110(a)(2)(D)(i)(II) of the CAA. A PSD permit may not be issued unless the new or modified source demonstrates that emissions from the construction or operation of the facility will not cause or contribute to air pollution in any area that exceeds of any NAAQS or any maximum allowable increase (known as the PSD increment). 42 U.S.C. § 7475(a)(3); 40 CFR § 51.166(k). A NNSR permit may not be issued unless the new or modified source shows it has obtained sufficient emissions reductions to offset increases in emissions of the pollutants for which an area is in nonattainment, consistent with reasonable further program toward attainment. These offsetting reductions could also help serve to prevent significant deterioration in any instance where the emissions of a nonattainment pollutant from a source in a nonattainment area would impact a nearby attainment area for that pollutant.

In addition to PSD permitting program, a SIP may include additional measures as necessary to prevent air pollution in excess of the PSD increment that defines significant deterioration for each area. 40 CFR § 51.166(a). The EPA has not established PSD increments for ozone or $PM_{2.5}$. Without these compo-

nents of a PSD program, it is difficult for states to determine if additional measures are needed to prevent significant deterioration within the state. Likewise, a neighboring state cannot determine whether its SIP would interfere with such additional measures in another state's SIP. However, notwithstanding the absence of PSD increments for ozone and $PM_{2.5}$, states may continue to rely on their existing PSD and NNSR permitting programs to prevent significant deterioration of air quality within their own boundaries and in adjacent states.

Because the PSD and NNSR permitting programs currently applicable in each area require a demonstration that new or modified sources will not cause or contribute to air pollution in excess of the NAAQS in neighboring states or that sources in nonattainment areas procure offsets, EPA believes that states need not make an additional SIP submission containing rule changes or modeling demonstrations to address the "prevent significant deterioration" requirement of section 110(a)(2)(D)(i)(II) for the 8-hour ozone and $PM_{2.5}$ NAAQS. For 8-hour ozone, each state only needs to make a SIP submission confirming that major sources in the state are currently subject to PSD and NNSR permitting programs that implement the 8-hour ozone standard and that SIP-approved states are on track to meet the June 15, 2007 deadline for SIP submissions adopting the requirements of the Phase II ozone implementation rule. For $PM_{2.5}$, states need only provide a SIP submission confirming that major sources in the state are subject to PSD and NNSR permitting programs implemented in accordance with

EPA's interim guidance calling for use of PM^{10} as a surrogate for $PM_{2.5}$ in the PSD and NNSR programs. Additional SIP submissions will be due after the final NSR implementation rules for $PM_{2.5}$ are promulgated.

The EPA will assist each State to evaluate the available information and to develop a sufficient SIP submission and demonstration to meet this element of section 110(a)(2)(D)(i). The EPA will take action on the SIP submissions made by States through notice and comment rulemaking, thereby assuring that the requirements are met.

6. SIP Submissions from States pertaining to the "protect visibility" requirement of section 110(a)(2)(D)(i):

Section 110(a)(2)(D)(i)(II) also contains a requirement for all States to submit SIPs that contain adequate provisions prohibiting " . . . any source or other type of emission activity within the State from emitting any air pollutant in amounts which will—interfere with measures required to be included in the applicable implementation plan for any other State. . . . to protect visibility."

The EPA adopted a phased approach to visibility protection, issuing regulations in 1980 to address reasonably attributable visibility impairment, i.e., visibility impairment that is caused by the emissions of air pollutants from one, or a small number of sources, and issuing regulations in 1999 to address regional haze, i.e., "visibility impairment that is caused by the emission of air pollutants from numerous sources located

over a wide geographic area."[7] Under the 1980 regulations, 33 States and the Virgin Islands were required to submit SIPs to address reasonably attributable visibility impairment. At this point in time, EPA has made no determination that emissions from any State interfere with measures required to be included in a plan to address reasonably attributable visibility impairment. Further, EPA is not aware of any certification of existing reasonably attributable impairment of visibility by a Federal Land Manager that has not already been resolved. The EPA accordingly believes that States should be able to make a relatively simple SIP submission verifying that no source within the State emits pollutants that interfere with measures included in the visibility SIPs under the 1980 regulations.

In 1999, EPA found that all States contain sources whose emissions are reasonably anticipated to contribute to regional haze in one or more Class I areas.[8] Pursuant to this finding, States are currently under an obligation to submit SIPs that contain measures to address regional haze, including a long-term strategy to address visibility impairment for each Class I area which may be affected by emissions from a State.[9] The States and Regional Planning Organizations are currently engaged in the task of identifying those Class I areas impacted by each State's emissions and

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[7] See, 40 CFR section 51.300-308.

[8] See, "Regional Haze Regulations," 64 FR 35,714, 35,721 (July 1, 1999).

[9] 40 CFR 51.308(d)(3).

developing strategies for addressing regional haze to be included in the States' regional haze SIPs. These SIP submissions are due no later than December 17, 2007.

As a result, EPA believes that it is currently premature to determine whether or not State SIPs for 8-hour ozone or $PM_{2.5}$ contain adequate provisions to prohibit emissions that interfere with measures in other States' SIPs designed to address regional haze. Accordingly, EPA believes that States may make a simple SIP submission confirming that it is not possible at this time to assess whether there is any interference with measures in the applicable SIP for another State designed to "protect visibility" for the 8-hour ozone and $PM_{2.5}$ NAAQS until regional haze SIPs are submitted and approved.

The EPA will assist each State to evaluate the available information and to develop a sufficient SIP submission and demonstration to meet this element of section 110(a)(2)(D)(i). EPA will take action on the SIP submissions made by States through notice and comment rulemaking, thereby assuring that the requirements are met.

7. When should States make section 110(a)(2)(D)(i) SIP submissions?

The EPA made the finding of failure to submit in April of 2005, with an effective date of May 25, 2005. As a result of the finding of failure to submit, the CAA imposes a 24-month clock for EPA to issue a FIP, unless a State has made the required submission to cure the failure to submit and EPA has acted to ap-

prove such submission fully in advance of the end of the 24-month period.

In conjunction with the CAIR, EPA has promulgated a FIP for all jurisdictions in the CAIR region to provide a federal backstop to insure timely and effective reductions of emissions from those States in accordance with section 110(a)(2)(D)(i)(I). The EPA has not, however, promulgated a FIP addressing section 110(a)(2)(D)(i) for any States outside of the CAIR region. States outside the CAIR region must therefore make submissions to meet the significant contribution and interference with maintenance requirements of section 110(a)(2)(D)(i)(I) to avoid a FIP addressing those requirements. In addition, all States have an outstanding statutory obligation to make a SIP submission to meet the requirements of section 110(a)(2)(D)(i)(II) in avoid a FIP for those requirements.

The EPA is currently under an obligation to issue a FIP by May 25, 2007, for any State that does not make a submission that cures the outstanding elements of section 110(a)(2)(D)(i) for that State. Unless the State makes the necessary SIP submission sufficiently in advance of that date for EPA to evaluate the submission and to take the necessary rulemaking action to approve or disapprove it, EPA may need to initiate the FIP rulemaking process in order to meet the May 2007 FIP deadline. For this reason, EPA believes that it would be appropriate for each State to make the SIP submission necessary to meet its outstanding obligations under section 110(a)(2)(D)(i) well in advance of

the May 25, 2007 FIP deadline. The EPA therefore suggests that States should make their SIP submission by no later than November 25, 2006, in order to allow adequate time for the necessary Agency action on the submission.

The EPA recognizes that this target SIP submission date is only 18 months after the effective date of the finding of failure to submit, and that the Agency is issuing this guidance concerning the necessary SIP submissions only shortly in advance of the target date. As a result, EPA intends to be as flexible as possible with respect to the target SIP submission date and will work with States to insure that they can make appropriate SIP submissions as close to November 25, 2006, as possible. However, in the event of submissions significantly later than this date, EPA may need to initiate the FIP process to meet its own statutory obligations to implement FIPs where States fail to submit SIPs that the Agency can approve in advance of the May 25, 2007 FIP deadline.

Attachment A: States subject to the CAIR

Alabama	Mississippi
Arkansas (ozone only)	Missouri
Connecticut (ozone only)	New York
Florida	New Jersey
Delaware	North Carolina
Georgia (PM 2.5 only)	Ohio
Illinois	Pennsylvania
Indiana	South Carolina
Iowa	Tennessee
Kentucky	Texas (PM 2.5 only)
Louisiana	Virginia
Maryland	West Virginia
Massachusetts (ozone only)	Wisconsin
Michigan	District of Columbia
Minnesota ($PM_{2.5}$ only)	

[SEAL OMITTED]

STATE OF DELAWARE
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October 1, 2010

EPA Docket Center, EPA West (Air Docket)
U.S. Environmental Protection Agency,
Mail Code: 2822T
1200 Pennsylvania Avenue, NW.,
Washington, DC 20460.

Attention: Docket ID No. EPA-HQ-OAR-2009-0491

In the August 2, 2010, Federal Register (Vol. 75, No. 147) the Environmental Protection Agency (EPA) proposed revisions to 40 CFR Parts 51, 52, 72, 78, and 97, Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone. The State of Delaware welcomes the opportunity to provide comments regarding this proposed rule.

Delaware has complied with the requirements of Clean Air Act (CAA) Section 110(a)(2)(D)(i) by effectively controlling emissions sources within Delaware so that those sources do not contribute significantly to downwind states' non-attainment or interference with

downwind states' maintenance of National Ambient Air Quality Standards (NAAQSs). However, Delaware's ability to attain and maintain the NAAQSs is significantly hampered by emissions from sources in upwind states that have not taken measures to control their air pollutant emissions. This is discussed in detail in Delaware's December 15, 2008 CAA 126 petition to the EPA.

Delaware provides the following eleven (11) comments on the proposed transport rule.

1. *Delaware believes that it has been inappropriately named as a State that needs to be covered by the proposed transport rule.* According to the proposed rule the EPA modeled their 2012 Base Case emission projections to determine whether States met a threshold for "linkage" and thus "significant contribution to, and/or interference with maintenance" to downwind areas. The results of EPA's 2012 Base Case modeling show that Delaware's downwind contribution exceeds one or more of these thresholds for the ozone, annual and daily fine particulate matter NAAQSs. Consequently, the EPA concluded that Delaware needed to be included in the transport rule. Delaware does not agree with this conclusion for the following reasons:

    - Delaware's sulfur dioxide (SO2) and nitrogen oxides (NOx) emissions are significantly overstated in the proposed transport rule analysis. Delaware compared its 2005 Periodic Emissions Inventory (PEI) with EPA's

2005 emissions used in the proposed transport rule. Delaware then projected its 2005 PEI emissions to 2012, and compared them to the proposed transport rules 2012 Base Case emissions. The results, which are summarized in Table 1 and Table 2 below, indicate that EPA's NOx and SO2 emissions are inflated for 2005 and both NOx and SO2 are significantly inflated in 2012.[1]

Table 1 2005 Emissions

2005 SO2	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	32,378	34,859	5,859	11,648	422	85,166
DE PEI Emissions	31,745	34,686	1,034	2,755	422	70,642
DE Emission Difference (tpy)	-633	-173	-4,825	-8,893	0	-14,524
% Difference	2%	0%	82%	76%	0%	17%

2005 NOX	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	11,917	5,567	3,259	15,567	22,569	58,879
DE PEI Emissions	11,397	5,999	2,317	11,728	22,569	54,010
DE Emission Difference	-520	432	-942	-3,839	0	-4,869
% Difference	4%	8%	29%	25%	0%	8%

[1] Delaware's 2012 projections' assumptions and methods are discussed in Attachment 1 to this letter, "*Delaware Division of Air Quality (DAQ) Technical Support Document for Emission-related Comments on the Proposed Transport Rule.*"

Table 2 2012 Projected Emissions

2012 SO2	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	7,841	10,974	5,858	14,193	98	38,364
DE Projections	7,356	5,941	1,034	2,201	98	16,530
DE Emission Difference	-485	-5,033	-4,824	-11,992	0	-22,334
% Difference	6%	46%	82%	84%	0%	57%

2012 NOX	EGU	NonEGU	Nonpoint	Nonroad	Onroad	Total
Transport Rule	4,639	5,567	3,248	15,511	10,700	39,665
DE Projections	2,418	4,504	2,315	10,370	10,700	30,307
DE Emission Difference	-2,221	-1,063	-933	-5,141	0	-9,358
% Difference	48%	19%	29%	33%	0%	24%

Because EPA's 2005 and 2012 emissions inventories are inflated Delaware believes that EPA's modeling of 2012 base case emission over-states Delaware's contributions to downwind areas (i.e., over-estimated emissions inventories result in over-estimated contributions to downwind areas).

Much of the inventory differences are due to control measures Delaware has implemented that are not reflected in the EPA analysis.[2] Delaware believes that once the EPA inventories are corrected, modeling will show that it is not necessary to subject Delaware to the transport rule.

- Despite that EPA inventories for DE are inflated (see above and Attachment 1 to this letter), EPA's inventories themselves indi-

[2] See Attachment 1 to this letter for a detailed discussion of these control measures.

cate that it is not necessary to include Delaware in the transport rule, i.e.:

> Without variability limits, EPA proposes at 40 CFR 97.410 a 2012 Delaware NOx budget of 6,206 TPY, and at 40 CFR 97.710 a 2012 Delaware SO2 budget of 7,784 TPY. EPA has indicted that a state's emissions budget " . . . *is the quantity of emissions that would remain in that state from covered sources after elimination of that portion of each state's significant contribution and interference with maintenance that EPA has identified in today's proposal, before accounting for the inherent variability in power system operations . . . The state emissions budget is a mechanism for converting the quantity of emissions that a state must reduce (i.e., the state's significant contribution and interference with maintenance) into enforceable control requirements. In other words, it provides a quantity of emissions to use in developing a remedy...*"

However, EPA's 2012 base case emissions for Delaware EGU's are 4,639 TPY for NOx and 7,841 TPY for SO2, Since the EPA is establishing Delaware's EGU budgets at a level that is not less than its 2012 base case

emissions[3], Delaware has already met its obligation to remedy downwind contributions for NOx and SO2.

Given the above, Delaware should not be included in the final Transport Rule, since our current control strategies have already mitigated our significant contributions to downwind areas.

2. *The establishment of annual and/or seasonal EGU cap-and-trade programs and mass emissions budgets alone is insufficient.* In the proposed rule, EPA has proposed to establish a cap-and-trade program for annual SO2, annual NOx, and seasonal NOx for the purpose of mitigating the transport of fine particulate matter and ozone. A centerpiece of this proposal is the establishment of cap-and-trade programs: a SO2 cap-and-trade program with annual state-by-state SO2 mass emissions caps and provisions for unlimited intrastate trading and limited regional trading; a NOx cap-and-trade program with annual state-by-state NOx mass emissions caps and unlimited intrastate and regional trading; and a NOx cap-and-trade program with ozone season NOx mass emissions

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[3] The difference between the EPA 2012 base case SO2 inventory and the proposed budget for Delaware is 57 TPY. Once the EPA corrects the problems with the inventory 1) overall modeled contributions will be much less given that EPA's 2012 SO2 projections are inflated on the order of 57%, 2) Delaware's 2012 EGU projection will be less than the proposed budget.

caps and unlimited intrastate and regional trading. In the preamble to the proposed rule the EPA also indicated that it was soliciting comments on two alternatives. The first alternative is the implementation of a program similar to proposed cap-and-trade program that excludes the regional trading aspects of the proposed program but still permits intrastate trading. The second alternative is a program based on establishing unit-specific emission rate limits based on historic emission rates and installation of controls, while maintaining state-specific mass emission caps similar to the proposed option. This second alternative also requests comment on including averaging for units owned by a common company in that state.

It is Delaware's opinion that establishment of annual and/or seasonal EGU cap-and-trade programs and mass emissions budgets alone is insufficient to mitigate transport and assure the elimination of contribution of upwind states to downwind state noncompliance with short term NAAQS. Delaware believes that instead of allowing a cap-and-trade program's market forces to determine which EGUs are controlled, well controlled, or not controlled, all EGUs should be subject to compliance with both short term emission rate limits/performance standards (that are supportive of applicable short term NAAQS) and longer term annual and seasonal mass emissions caps. Short term emission rate limits/performance standards should be estab-

lished on the basis of technical and economic feasibility, on a unit-by-unit basis, such that the limits/standards are supportive of the short term NAAQS. These short term emission rate limits/performance standards would also be expected to help alleviate episodic air quality excursions. Given this opinion, Delaware is generally supportive of the EPA further developing and implementing its second alternative, as discussed in the preamble to the proposed rule, (i.e., a program based on establishing unit-specific emission rate limits and installation of controls) as the focus of this rulemaking effort.

Delaware generally agrees with the concept presented for EPA's second alternative to the proposed program that includes establishing unit-by-unit performance standards/emission rates along with an overlaying cap-and-trade program, but recommends EPA consider some revisions to the process presented by the EPA for that second alternative.

- The first recommendation is that EPA reconsiders the use of the most recent quarterly data from the period 2007 through 2009 as the baseline. It is popularly viewed that calendar year 2007 is the last calendar year that has little effect from the current economic downturn. As such, it is assumed that the operation of EGUs in 2007 is more representative of expected normal operation for the units that operated during that peri-

od. For many of the units not incorporating post-combustion controls, unit hourly loading and average capacity factor can have a noticeable effect on emission rates (in terms of lb/MMBTU or lb/MW). Therefore, it is Delaware's opinion that utilizing 2007 operating data would provide a more accurate indication of both the units' uncontrolled emission rate and the emission rate resulting from the theoretical installation of emission controls. For units that did not operate in 2007, such as new units, emissions data from the earliest of 2008 or 2009, as applicable to the individual unit, could be utilized.

- The second recommendation is that EPA reconsiders the use of averaging the emission rate of all of a single company's EGUs in a given state as a compliance alternative. While Delaware agrees that this concept has merit in providing a company flexibility in control installation planning and compliance strategy, Delaware also believes that this flexibility could result in a number of smaller and/or low capacity factors to continue operation with little or no controls. The existence of such units contributes to transport issues and compliance with short term NAAQS. If EPA retains the concept of permitting same-company averaging for compliance, Delaware recommends that EPA consider doing so for only a small number of compliance periods to provide some

initial flexibility for control installation planning until transitioning to a true unit-specific compliance requirement.

In the TSD ***State Budgets, Unit Allocations, and Unit Emissions Rates,*** Section 4, Direct Control Rate Limits, EPA indicates that, "The unit-level rates which sources must comply with under this approach are determined analogously to unit-level allocations—each unit's proposed allocation is divided by the reported or projected heat input associated with that tonnage." It is not clear that the modeling inputs are adequate to perform a proper evaluation. Further, it appears that the emission rate limits would still be determined primarily on an economic basis, thereby still allowing some units to operate with little or no emission controls. It is Delaware's opinion that this methodology does not adequately evaluate, on a unit-by-unit basis, the technical or economic feasibility of installation of cost-effective emission controls for these units. The methodology therefore may not adequately determine realistic emission rate limits for all of these units. It is Delaware's opinion that unit-by-unit technical evaluations are necessary to properly set such emission rate limits for every EGU in the program. Such evaluations must take into account the unit types, fuel(s) combusted, unit size, unit historic capacity factor, projected additional lifetime,

existing emissions controls, commercially available controls for retrofit, etc.

- Delaware is also concerned with EPA's concept of providing 1-year and 3-year average variability mass emission provisions that could serve to allow upwind states to increase their emissions above the limit that EPA has calculated to be required to fully eliminate that state's significant contribution or interfere with maintenance in a downwind state. It is Delaware's understanding that EPA has considered the use of this variability concept in order to help address concerns regarding the variability in electric demand and to prevent impact on electric grid reliability. While Delaware understands the need to maintain grid reliability, it is Delaware's concern that under this scenario any given upwind state, or group of upwind states, could potentially emit on a routine basis at levels that exceed the values calculated by the EPA as needed to eliminate significant contribution and interference with maintenance in a downwind state. It is Delaware's opinion that the proposed variability concept be eliminated or revised such that any revision would preclude the potential for and upwind state or group of upwind states to significantly contribute to a downwind state's inability to comply with applicable NAAQS, or interfere with maintenance of that NAAQS.

3. *Co-generation Unit Exemption.* In the preamble to the proposed rule EPA requested comments regarding the length of the historic period that would be appropriate for a "look back" to determine if a unit met the efficiency and generation requirements to be eligible for the co-generation unit exemption provided for in the proposed rule. EPA is proposing the use of November 15, 1990 or the date on which the unit first produces electricity, whichever is later, as the date for which the unit must have started meeting the efficiency and generation requirements to be defined as a co-generation unit. In the preamble to the proposed rule EPA indicates that it may be difficult for some units to produce historic data of that age, and requests comments on utilization of a later date. Delaware agrees that the "look back" period for co-generation unit exemption determination should be shorter than the EPA has included in the proposed rule. Specifically, Delaware believes the "look back" period for determination of eligibility for the co-generation unit exemption should be the later of the calendar year prior to the effective date of the rule or the first full calendar year after the unit first produces electricity. Using this one year "look back" for determination of co-generation exemption eligibility would make this requirement more consistent with proposed rule's requirement for co-generation units to re-qualify for the exemption on an annual basis.

4. *State Contribution Thresholds.* In Section III.A. of the preamble to the proposed rule, EPA discusses that the proposed methodology of the rule uses air quality analysis to determine whether a state's contribution to downwind air quality problems is above specific thresholds. EPA states, "If a state's contribution exceeds those thresholds, EPA takes a second step that uses a multi-factor analysis that takes into account both air quality and cost considerations to identify the portion of a state's contribution that is significant or that interferes with maintenance." This statement is troubling to Delaware. It is Delaware's opinion that an upwind state's emissions contribution is significant or interferes with maintenance in a downwind state based on the emissions and their effect on air quality, and is independent of cost considerations. It is Delaware's opinion that cost considerations are relevant when selecting the source category or population of sources that are to be targeted for control, not in determining if the emissions contribute to significant contribution or interference with maintenance in a downwind state.

5. *EGU Inventories.* During review of EPA's technical support documents for budgets and allocations for the proposed rule, Delaware has identified a number of problems with the inventory of EGU's included by EPA in the development of the budget and allocation levels for

Delaware.[4] The problems noted during Delaware's review include the following:

- EPA's proposed rule unit inventory has included in Delaware's unit inventory a number of units that are co-generation units.
- By combining sources of data and information concerning units, as discussed in EPA's TSD ***State Budgets, Unit Allocations, and Unit Emissions Rates,*** EPA "double counted" emissions among three Delaware units, by accounting for emissions for two header supplied steam turbine-generators from one data source, and then from another data source accounting for emissions from a boiler that supplies that steam header for the two header supplied steam turbine-generators.

  EPA's emissions data and allowance allocations have included header steam turbine generating units that are supplied by multiple non-fired heat recovery steam generating units. As the boilers are not fired, it is uncertain how they would produce emissions given that the emissions associated with re-

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[4] Because of the generic nature of some of these apparent problems, Delaware is of the opinion that similar issues may exist for some other states subject to this proposed rule. These problems that appear to have the potential to generic in nature should be investigated by EPA and corrected as necessary in establishing final emissions budgets, allocations, etc.

lated combustion turbines are attributed directly to those combustion turbines.

- EPA excluded two Delaware units from the proposed program, apparently due to the EPA's data assigning the units output ratings less than 25 MW. It appears that the EPA based this rating on data that indicates that these units have "summer" ratings of 22 MW on a net output basis. However, these particular units have "nameplate" ratings in excess of 25 MW, and also have "winter" ratings of 25 MW on a net basis. There are three apparent issues demonstrated within this problem.
    - The first apparent issue is the use of "summer" output ratings, which includes the effect of higher summer temperatures reducing the output of the unit, which is contrary to the definition of nameplate rating included in the EPA's proposed rule which states, "Nameplate capacity means, starting from the initial installation of a generator, the maximum electrical generating output (in MWe) that the generator is capable of producing on a steady state basis and during continuous operation (when not restricted by seasonal or other deratings) as of such installation as specified by the manufacturer of the generator . . . "

- The second apparent issue with the use of "summer " output ratings, is that the "summer" output ratings includes the effect of higher summer temperatures that tend to reduce the output of some units (combustion turbines and steam units). This appears to be contrary to EPA's definition in the proposed rule, as noted above, that indicates that the nameplate rating should not include any capacity restrictions due to "seasonal or other deratings".

- The third apparent issue is the use of these values that are "net" unit electrical outputs, or the electrical output available to the grid after subtracting any electrical energy that is utilized by the unit in the generation of the total electrical energy. The definition of nameplate capacity in EPA's proposed rule, as noted above, clearly indicates that EPA intends that nameplate capacity be the gross electrical output, or total electrical output from the generator.

6. *Allowance Distribution Methodology*. In the EPA's proposed rule and supporting technical support documents, EPA proposes an allowance distribution methodology for distributing allowances to individual units. The proposed unit-specific allowance allocations will be made on the basis of each unit receiving its proportional

share of its state budget based on that unit's share of state emissions assumed in developing the budget. Using this methodology, the units that historically had the highest emissions (in percentage of the state's total) would be allocated that same percentage of the states allocation. It appears that such a methodology provides a negative benefit to those units that either had a lower emission rate by design or installed controls to achieve a lower emission rate in the past. It is Delaware's opinion that it would be more appropriate to allocate allowances on the basis of a specific unit's historic heat input, as a percentage of the entire heat input that resulted in the state's total allowance allocation. It is Delaware's opinion that this would establish a fuel-neutral allocation methodology that does not provide a negative benefit to those units that had previous reduced their emission rates.

7. *Non-EGU Emission Reductions.* EPA has requested comments on whether non-EGU emissions reductions should be required and on the specific control measures that would serve as the basis for those reductions. It is Delaware's opinion that EPA should consider requiring emissions reductions for some non-EGU categories. Included in this view are fossil-fuel fired electric generating units with a nameplate rating between 15 MW and 25 MW, fossil-fuel fired co-generation units serving a generator with a nameplate rating of 15 MW or greater,

and fossil-fuel fired industrial and commercial (ICI) boilers with a heat input capacity rating of 250 MMBTU/hr or greater. It appears that these categories of units can contribute to air quality excursions and impact a downwind state's ability to attain NAAQS. It is Delaware's experience that the small EGUs (<25MW nameplate) tend to operate most during periods of high electric demand which often coincide with ambient air quality excursions in downwind states. While co-generation units tend to operate with a more constant capacity, there is some data that indicates those units' loading may increase during periods of high electric demand to capitalize on opportunities for increased income from electric sales during high cost periods or to offset the purchase of additional electric at high relative cost. The large ICI boilers also tend to operate with a relatively constant capacity factor, which would also include operation during the periods of high electric demand that may coincide with air quality excursions in downwind states.

It is Delaware's opinion that cost-effective emissions reduction technologies are proven and commercially available for these types of units. For boilers serving EGUs with nameplate ratings of 15 MW or larger (including co-generation units) or ICI applications, commercially available cost effective controls for retrofit include fuel switching in some cases for SO2 and NOx reduction, low-NOx burners and

SNCR and SCR for NOx control, and wet and dry scrubbers and sorbent injection for SO2 controls. For combustion turbines driving generators with nameplate ratings greater than 15 MW, including both EGU and co-generation application, commercially available cost effective controls for retrofit include fuel switching in some cases for SO2 and NOx control, and dry low-NOx burners, water injection, and SCR for NOx reduction. The March 2006 STAPPA/ALAPCO document "Controlling Fine Particulate Matter under the Clean Air Act: A Menu of Options" provides considerable discussion regarding the applicability of emissions controls for these units.

Delaware has also experienced some considerable success with its state rulemakings that resulted in control installations similar to those discussed above. One such rulemaking resulted in the addition of water injection for NOx control on all fossil-fired combustion turbines driving electric generators with a nameplate rating greater than 15 MW (but less than 25 MW) that had not been previously controlled. The affected units tend to operate as peaking units and operate primarily during periods of high electric demand. Post installation testing indicated significant NOx emission rate reductions were achieved by all of the affected units.

8. *Opt-in Provisions.* Somewhat related to the issue of including the smaller size units in a pro-

posed program is the concept of opt-in provisions in the proposed rule. EPA has requested comments regarding the appropriateness of the proposed rule's opt-in provisions. While Delaware does not necessarily oppose the opt-in provisions, Delaware is skeptical that the opt-in provisions would provide sufficient incentive for a source to make the commitment to perform an emission reduction project that would not have occurred anyway without the opt-in provisions. In this event, additional allowances would have been created without any environmental benefit as a direct result of the rule. In any event, it is Delaware's opinion that if the proposed rule addresses the smaller units (EGUs 15MW<>25 MW, co-generation units > 15MW, and ICI boilers > 250 MMBTU/hr) then the population of likely opt-in units will be greatly reduced.

9. *The EPA proposal is unnecessarily complex.* Delaware is supportive of EPA's efforts to propose a rule that effectively eliminates an upwind state's significant contribution or interference of maintenance with a NAAQS in downwind states. The EPA has provided much complex information and analysis in their proposal and technical support documents. Delaware has gleaned from the EPA documents that there are two main determinations being made: 1) a determination of whether a state significantly interferes with the attainment or maintenance of a NAAQS in a downwind state, and 2) a determination of the remedy for the states that do

significantly interfere. Delaware has spent considerable time studying the EPA proposal, and participating on telephone calls and meetings with others discussing the proposal, and has concluded that both EPA's characterization of the problem and the proposed solution have been made unnecessarily complex and difficult to understand and evaluate. This is a very important proposal to downwind states like Delaware. The health and welfare of Delaware citizens has and continues to be negatively impacted by emissions from upwind states, and those emissions must be mitigated. This unnecessary complexity has required Delaware to expend significant resources to review and understand the proposal, but even after spending many man-hours reviewing it is not clear that the rule will result in emission reductions once it is fully implemented.

10. *An EGU Cap-and-Trade Program alone is not sufficient to mitigate a states impact on downwind states.* Delaware understands the bottom line of the EPA proposal is that the control of EGUs is all that is needed in order for a state to mitigate its significant impact on downwind states. This conclusion is inconsistent with much of the information Delaware has learned in its efforts to address the ozone problem over the past 40 years, and the more recent fine particulate matter problems. The installation of all reasonably available control technology (RACT) on all volatile organic, nitrogen oxide,

and sulfur dioxide emitting sources is needed. In addition, advanced best available control technology (BACT) level controls on EGUs and other large sources stationary sources is needed. And, based on Delaware's experience the timing associated with the design, permitting and construction of advanced emission controls on EGUs is relatively short; on the order of 24-months. If upwind states were to implement these measures (i.e., RACT on all sources, and BACT on all large stationary sources), as Delaware already has, attainment of the current and upcoming ozone and PM2.5 NAAQSs would be in reach. Delaware believes these measures must be added as required elements of this proposal.

11. *The proposal does not offer necessary relief to downwind states.* Delaware understands that the EPA is in this proposal segregating transport related to the 0.08ppm ozone NAAQS from the lower 75ppb ozone NAAQS promulgated last year, and from the new lower ozone NAAQS anticipated to be finalized by the EPA later this month. This does not seem reasonable to states like Delaware who, despite having already subjected its sources to advanced and costly emissions control requirements, continues to be impacted by unhealthy air from upwind states. And, Delaware will continue to be impacted by this unhealthy air long into the future. Given the low level of the new ozone NAAQSs relative to current air quality, and the

overwhelming impact of transported emissions, further delay in installing and operating appropriate emission controls in upwind states is not warranted.

Thank you for providing this opportunity to comment. We look forward to the EPA promulgation of a rule that provides full mitigation of upwind emissions that continue to negatively impact public health and welfare in Delaware, and Delaware's ability to attain and maintain compliance with national ambient air quality standards.

Sincerely,

/s/ [ILLEGIBLE]
[for] ALI MIRZAKHALILI, P.E.
Director

Attachment

[LOGO OMITTED]

west virginia department of
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Sept. 30, 2010

EPA Docket Center
Attention Docket ID No. EPA-HQ-OAR-2009-0491
via e-mail to:
a-and-r-docket@epa.gov

RE: Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone; Proposed Rule. Docket ID No. EPA-HQ-OAR-2009-0491

Dear Docket Coordinator:

The West Virginia Division of Air Quality (WVDAQ) generally supports the proposed Transport Rule, and offers the following corrections, concerns and comments that may help improve the final rule. WVDAQ believes that EPA should promulgate an adequate Transport Rule that mitigates significant impacts on a schedule that helps states attain the National Ambient Air Quality Standards. WVDAQ also believes that EPA has carefully considered the concerns of the court, which in December 2008 remanded the Clear Air Interstate Rule (CAIR) back to EPA.

Limited Interstate Trading

Under the Acid Rain Program, the NOx Budget Trading Program and the CAIR, West Virginia electric generating sources have made significant reductions in SO_2 and NOx emissions, thereby helping to reduce or eliminate nonattainment problems related to interstate transport. WVDAQ generally supports the provisions limiting interstate trading in the proposed Transport Rule. The limited trading provisions will discourage the practice of sources, in some states, of purchasing allowances to cover uncontrolled emissions (renting compliance), rather than obtaining emission reductions from the installation of scrubbers and catalytic reduction devices. Because of the reduction in flexibility for applicable sources, WVDAQ does not support the intrastate trading or direct control alternatives in the proposed Transport Rule.

Corrections to Proposed Data

WVDAQ has analyzed the initial data contained in the proposed Transfer Rule docket, and have found the following errors that should be corrected in the final rule:

a. The Alloy Steam Plant is a non-EGU source and should not be grouped with EGU sources nor included in the IPM modeling or allocated allowances in the Transport Rule. The Alloy Steam Plant was erroneously included in both the NEEDS v3.02 EISA and NEEDS v4.10 databases (ORIS 50012, Unique ID 50012_B_BLR4), and was allocated allowances in the TSD Allocation Table. The allowances allocated to Alloy

should be redistributed to existing EGU sources in West Virginia.

b. The Longview Power Plant was incorrectly identified in the NEEDS v3.02 EISA database as RFCP_WV_Coal steam, ORIS Code 82716, Unique ID 82716_B_1, and was incorrectly identified in NEEDS v4.10 database as RFCP_WV_Coal steam, ORIS Plant Code 82914, Unique ID 82914_C_1. Longview Power Plant's correct ORIS Code is 56671. Although Longview was included as an existing unit in 2012 and allocated allowances for 2012 in the TSD Allocation Table, the source was not allocated any allowances in 2014, even though it was included in the modeling and parsed files for 2014. Longview is scheduled to be online in early 2011, and by definition will be an existing EGU under the proposed rule. Longview Power Plant identification data should be corrected, and the source should receive allowances for both 2012 and 2014, along with other existing EGU sources in West Virginia.

c. The Big Sandy Peaker Plant (ORIS ID 55284) was allocated allowances for its twelve units identified in the TSD Allocation Table as units BSG1, BSG2, BSG3, BSG4, BSG5 and BSG6; GS07, GS08, GS09, GS10, GS11 and GS12. However, only six of the units (BSG1, BSG2, BSG3, BSG4, BSG5 and BSG6), are included in the parsed files. Big Sandy Peaker Plant has six generators, each served by two turbines, for a

total of twelve turbines with a combined generation capacity of 300 MW_e.

Programmatic Transitional Concerns

Non-EGU ICI Boilers—West Virginia's non-EGU industrial, commercial and institutional boilers have participated in a seasonal EPA market trading program since 2004. The ICI boiler sources in West Virginia have been good players under the NOx Budget Trading Program, and through their participation under CAIR. Under the proposed Transport Rule, non-EGU sources are not included, nor are EPA's plans to continue similar regulation for these significant sources. It is generally understood that non-EGU ICI boilers and perhaps other non-EGU sources will be addressed by EPA in Transport Rule II.

Because West Virginia repealed its NOx SIP Call rules when transitioning to CAIR (with the full knowledge and consent of EPA's Region III and Clean Air Markets Division), there appears to be no mechanism that will ensure that seasonal NOx reductions from ICI boilers and continued reporting of NOx emissions under 40 CFR Part 75 will occur in 2012-2014. It should be noted that future emissions reductions from ICI boilers have been accounted for in West Virginia's submitted attainment demonstrations and SIP-approved maintenance plans. WVDAQ believes it is important that ICI boilers continue reporting NOx emissions under 40 CFR Part 75, and that the EPA prevent backsliding from the non-EGU sectors. Such a mechanism will also ensure continuity of data if EPA for some reason does not finalize Transport Rule II.

WVDAQ does not consider the opt-in provisions of the proposed Transport Rule to be an appropriate mechanism to define a clear regulatory path or ensure continuity of Part 75 emissions data for non-EGU ICI boilers.

WVDAQ believes that EPA should squarely address the immediate need for guidance or rulemaking which provides a clear regulatory path for large ICI boilers, and their role in interstate transport and significant contribution mitigation issues. If CAIR provisions must cease in 2012, at a minimum, EPA should provide a mechanism to ensure that ICI boilers continue reporting their NOx emissions under Part 75.

State Implementation Plans—WVDAQ is concerned that significant increases in some state budgets over CAIR may adversely affect the integrity of many attainment and Regional Haze SIPs. West Virginia relied on CAIR reductions for the Regional Haze SIP, as well as the 1997 PM_{25} SIPs, and the 8-hr Ozone Maintenance Plans. Therefore, the Transport Rule NOx budgets need to be at least as stringent as the SIP-approved CAIR NOx budgets. As previously noted, future emissions from ICI boilers have been accounted for in West Virginia's submitted attainment demonstrations. WVDAQ believes it is important that the final rule not contravene the anti-backsliding provisions of the Clean Air Act.

WVDAQ will most likely issue emergency rules in December 2011 to eliminate state CAIR provisions in 2012. However, the CAIR ozone season rule 45CSR40 may continue with a limited scope that car-

ries forth seasonal reduction requirements for NOx SIP Call Phase II sources such as internal combustion engines and cement kilns. West Virginia would not be able to submit a full SIP revision eliminating CAIR until Summer 2013.

The proposed Transport Rule does not provide a mechanism for replacing the Transport Rule FIP with a SIP, and the action of EPA issuing a FIP with no SIP mechanism wrongly implies that states have intentionally failed to comply with Clean Air Act requirements.

Significant Contribution

Significant Contribution and Interference with Maintenance—EPA requested comment on the pollutants and air quality thresholds used for identifying states to be included under the Transport Rule. WVDAQ notes that the courts have been supportive of EPA's specific thresholds in the past. However, as the National Ambient Air Quality Standards become more stringent, a fixed one percent value may lead to inappropriate results, and could yield "significance" thresholds that are practically unmeasurable. Just because a value can be modeled does not make it necessarily measurable or meaningful. WVDAQ believes that the significance threshold should consider both the percent of National Ambient Air Quality Standards and the reality of limited measurement precision.

In the final Transport Rule, WVDAQ requests a tabular summary by state and pollutant that demonstrates the reductions necessary for each state to elim-

inate significant contribution and interference with maintenance (without considering costs).

Rounding Convention—EPA also requested comment on whether the final Transport Rule should use the same rounding convention that was used in the final CAIR for the 15$\mu g/m^3$ annual PM_{25} standard, or whether commenters agree with EPA's approach that does not use this rounding convention. WVDAQ believes that the rounding convention should directly consider the practicality of the rounding convention with respect to the precision of the applicable federal reference method monitors.

Transport Rule Budgets

While both the ozone season and annual NOx budgets for 2012 and 2014 for West Virginia have been reduced from CAIR levels under the proposed Transport Rule, the budgets for some other states have increased by significant amounts. Florida and Pennsylvania both receive large proposed increases in their annual NOx budgets—20,556 and 14,854 tons, respectively in 2012, and 37,130 and 31,362 tons, respectively in 2015; and their ozone season NOx budgets are proposed to increase by 9,027 and 6,100 tons, respectively, in 2012 and 17,013 and 13,128 tons, respectively in 2015. It is difficult to perform a comparison of the regional budgets because the states affected by the Transport Rule and CAIR vary. An analysis of the budgets of the states affected by both CAIR and the Transport Rule for annual NOx shows there are twelve states that have increased annual NOx budgets under the proposed Transport Rule, and twelve states with de-

creased annual NOx budgets, resulting in a decrease of 49,858 tons for the states covered under both rules for 2012. However, only seven states show a decrease in their annual NOx budgets for 2015, and there is a regional increase of 170,621 tons of annual NOx in 2015. Similar issues arise with the ozone season NOx budgets.

Under the proposed Transport Rule, the 2014 annual NOx emission cap is too generous—more than CAIR Phase II. It is widely assumed that Transport Rule II will rectify this, as the intended rule will address a new ozone standard. Leaving the 2014 NOx cap at its proposed level will hinder efforts to mitigate interstate transport and significant contribution, especially if Transport Rule II is not promulgated for some reason. In the final rule, EPA should include a 2014 annual NOx emission budget which is technologically feasible and cost effective. WVDAQ questions whether the proposed 2014 NOx cap might be considered backsliding under the Clean Air Act.

Pennsylvania is central to the Northeast's nonattainment problems, and Pennsylvania sources have "rented compliance" in past and current transport programs. Comparing the proposed Transport Rule 2012 budgets to the budgets under CAIR, Pennsylvania would receive 15 percent more of the annual NOx budget over that state's allotment under CAIR, while West Virginia would receive a 30 percent decrease in annual NOx budget from CAIR. Considering that West Virginia sources have made significant reductions in SO_2 and NOx emissions, this and similar com-

parisons indicate that the proposed budget methodology in the Transport Rule creates a situation where states that already have highly controlled sources (under the NOx Budget Trading Program and CAIR) receive budgets that disadvantage the units that controlled their emissions earlier in favor of states with many yet uncontrolled units. EPA should revise the Transport Rule allocation methodology to minimize such disadvantages, provide increased incentive to control uncontrolled units, and distribute allowances in a more equitable manner.

Budget Methodology and Allowance Allocations

Proposed Budget Methodology—WVDAQ is unable to fully duplicate the 2012 or 2014 allocations for West Virginia. Some allocations cannot be replicated using the methodology outlined in the proposed Transport Rule preamble. Such a problematic situation does not allow a clear and concise understanding of EPA's allowance allocation methodology.

In the supporting RIA document, EPA explains that the base case includes the Title IV Acid Rain Program, the NOx SIP Call, and states' rules through February 3, 2009. CAIR subsumed the NOx Budget Trading Program, and West Virginia repealed its NOx Budget Trading Program rules and submitted the repealed rules to EPA as a revision to the SIP. Therefore, only the NOx SIP Call provisions for internal combustion engines and cement kilns are still on the books in West Virginia. EPA appears to count on the NOx SIP Call in the base case even though the program is effectively dismantled and not in force.

WVDAQ believes that because CAIR was ultimately remanded and not vacated, EPA should rely on CAIR for a real-world base case analysis.

Use of IPM Model—WVDAQ questions the use of IPM predictions as the basis of determining emission budgets and allocations. In the past, IPM has delivered mixed results and does not appear to be a good predictor of the future, especially when applied at the source level. EPA has previously indicated that IPM *is a solution, not the solution,* implying that there are different methods to determine transport emission budgets and allocations. Based on the constraints applied, IPM provides a least-cost solution, but *IPM* may not be the only method to determine emission budgets and allocations. Our experience with past applications of IPM shows that it can and does make problematic and significant mistakes, such as incorrect predictions of shut down or non-operating units, or applying controls for sources which the owner has no intention of installing.

As an example of the problematic use of IPM, the TSD Allocation Table indicates that IPM projections are used as the basis of the SO_2 allocations, yet reported emissions data are used as the basis of the NOx annual and ozone season allocations. A review of the docket spreadsheet BADetailedData.xls, on the Allocations and Rate Limits worksheet, under the column headings *Heat Input Assumed in Annual NOx Allocation* and *Heat Input assumed in 2012 SO_2 Allocation,* there are differences of more than 100 percent in the heat inputs which are used as the basis of the NOx

and SO_2 allocations for 2012. For instance, Albright Unit 1 (ORIS Code 3942), has a *Heat Input Assumed in Annual NOx Allocation* of 2,050,480 mmBtu and a *Heat Input assumed in 2012 SO_2 Allocation* of 5,960,450 mmBtu.

In this example, the heat input assumed for Albright's SO_2 allocations is 290 percent of the heat input assumed for the NOx allocations for the same period. WVDAQ questions EPA's decision to use a different basis (projected vs. reported data), which assumes different heat inputs for the same time periods and for different pollutants. WVDAQ believes that this is but one demonstration of how the use of IPM model results can skew emission budgets and allocations from a reasonable result.

WVDAQ also questions whether it is appropriate to allocate allowances based on IPM predicted emissions for 2012. As previously noted, it is apparent that EPA's decision to base allocations on projected (or even historical) emissions penalizes sources that have installed controls. This observation is of greater concern considering that EPA proposes to allocate to existing units one time, before the Transport Rule cap and trade programs commence. Except for non-operating units, the allocations would be permanent as base amounts, and would not be updated. As such, WVDAQ does not believe it is appropriate for EPA to use IPM projections as the basis of the allocations. WVDAQ therefore supports a more appropriate metric, the alternative allocation method proposed in the Transport Rule.

Alternative Allocation Method—EPA requested comment on an alternative methodology that links unit allowances directly to the way state budgets were developed. This alternative method for allocating allowances would have the effect of distributing the responsibility for eliminating all or part of a state's overall significant contribution and interference with maintenance to individual units based on each unit's share of projected heat input. WVDAQ believes that the alternative allocation method is more straightforward, transparent and equitable to sources that have installed controls than the proposed allocation method. EPA should maintain a consistent policy that encourages early emission reductions and rewards sources which achieve them. Therefore, we support inclusion of this alternative methodology in the final Transport Rule.

Non-Operating Units—EPA requested comment on the proposed approach for allocating allowances to non-operating units, as well as simplifying allocations by not allocating at all to non-operating units. EPA also requested comment on maintaining perpetual allocations to non-operating units, similar to the treatment of non-operating units in the Title IV Acid Rain Program. WVDAQ believes that non-operating units should receive a time-limited allocation, and a seven year limitation would still provide an incentive to shut down certain units that may not be cost-effective to control. Not allocating at all to non-operating units will diminish or eliminate such an incentive, while allocating in perpetuity may hinder the ability to establish new units. Therefore, WVDAQ supports the

proposed approach for allocating allowances to non-operating units, with the allocations transferred to the new unit set-aside after seven years.

Variability and Assurance Provisions

EPA requested comment on the proposed variability limits and assurance provisions. With the inclusion of EPA's alternative calculation method for variability, WVDAQ generally supports the variability and assurance provisions in the proposed Transport Rule. We believe that when properly applied, variability limits help achieve good air quality while still allowing for real-world outages and weather events. However, in a few cases, the proposed variability is so large that it becomes dominant over the state's budget. For example, the proposed one-year SO_2 variability limits for the District of Columbia and Connecticut, are 504 percent and 56 percent of their respective budgets, and the three-year variability limits are 291 percent and 32 percent of the respective SO_2 budgets.

As proposed, the one-year annual NOx variability limit for the District of Columbia is 2941 percent of its proposed budget, and the proposed three-year variability limit is 1698 percent of the District's proposed budget. The seven areas that would be affected by the use of the alternative calculation methodology for variability for annual NOx, have proposed one-year variability limits ranging from 21 percent to 2941 percent of their budgets, with three-year variability limits ranging from 12 percent to 1698 percent of their annual NOx budgets.

Similarly, the ozone season NOx one-year variability limit for the District of Columbia is 2000 percent of its proposed budget, and the three-year variability limit is 1154 percent of the proposed budget. The five areas that would be affected by the use of the alternative calculation methodology for ozone season variability limits have proposed one-year variability limits ranging from 29 percent to 2000 percent of the proposed budgets, and three-year variability limits ranging from 17 percent to 1154 percent of the proposed ozone season NOx budgets. WVDAQ believes that as proposed, the variability limits provisions are flawed. We therefore support EPA's alternative calculation method for variability, which contains a ceiling on the maximum percentage of variability.

Alternative Calculation Method for Variability—EPA also requested comment on an alternative calculation method for variability. The alternative method would use the results of the proposed method, but add a ceiling on the maximum percentage of variability among covered states as observed in the historic heat input data. For both NOx annual and SO_2, the percentage limits calculated using this alternative methodology are 21 and 28 percent of a state's budget, respectively. Under this alternative calculation methodology, a state's variability limit would be no lower than 10 percent of its budget and no higher than 21 or 28 percent, for NOx and SO_2, respectively. Because no state varied by more than these percentages, they could serve as reasonable caps on variability limits. These limits would address the issue of small states receiving very large variability limits as a frac-

tion of their budgets. The District of Columbia and Connecticut are the only areas that would be affected by the use of the alternative calculation methodology for SO_2 variability limits.

WVDAQ supports the use of EPA's alternative calculation methodology for variability limits, and believes a ceiling on the maximum percentage of variability is appropriate. We also agree that the maximum percentage of variability among covered states as observed in the historic heat input data could serve as reasonable caps on variability limits.

Violation Provisions—EPA requested comment on whether the exceedance of total emissions by an owner's sources over the owner's share of the state budget with the variability limit should be a violation of the Clean Air Act and thus subject to discretionary penalties. WVDAQ does not believe it is appropriate that an exceedance of the owner's share of the state budget with the variability limit should be a violation of the Clean Air Act, as it seems unfair that if a source holds enough allowances to cover their emissions, they are penalized for a situation that cannot be foreseen. If there are multiple companies operating in a state, they may not have immediate access to the emissions data for other's units and cannot predict that the total emissions for the state are going to exceed that variability limit. This is especially true for the three-year variability limit. WVDAQ believes that this Clean Air Act violation provision will discourage trading.

Absurd Results

WVDAQ finds it difficult to believe that EPA has determined that West Virginia significantly contributes to non-attainment St. Louis, Missouri. We believe that EPA needs to provide more explanation when model results are blatantly counter to expected outcomes.

Ozone Season

EPA requested comment on whether the budgets for the final rule should be based on a longer ozone season, such as March through October. WVDAQ believes the current ozone season as defined under CAIR (May through September) is adequate for the final Transport Rule. However, EPA may reconsider the period of the ozone season for purposes of Transport Rule II and EPA's new secondary ozone standard.

Comment Period and Notice of Data Availability

West Virginia believes that because the amount of information contained in the proposed Transport Rule preamble, proposed rule text, and technical support documents are both voluminous and complex, the sixty day comment period is an inadequate amount of time to conduct a thorough review. WVDAQ has encountered difficulty in reconstructing EPA's allocation and budget methodology. Moreover, we have discovered several significant errors in the proposed allowance allocations which may be an indicator that other substantive problems may remain undiscovered in documentation that has yet to be thoroughly reviewed.

Subsequent to the proposed Transport Rule, EPA released a Notice of Data Availability (NODA), which contains a substantial amount of additional information directly related to the proposed Transport Rule. EPA allowed only forty-five days for review of the NODA, thirty days of which are concurrent with the review of the proposed Transport Rule. The length and complexity of the proposed Transport Rule, in conjunction with the numerous technical documents and data files that EPA has relied upon to develop the proposal, make preparing and submitting detailed and constructive comments in the allotted time difficult. The issuance of the NODA (which contains new data and modeling results) demonstrates that EPA has acknowledged inaccurate or flawed data in the initial development of the proposed Transport Rule.

WVDAQ believes that EPA should evaluate and summarize the new data contained in the NODA, and the updated evaluation and summary should be placed in the rule-making docket so that states, affected sources and the general public can better understand the ramifications of the new information. It is apparent that comments prepared by states regarding data and modeling for the Transport Rule may need reevaluation in light of the new data contained in the NODA.

In a letter dated September 21, 2010, WVDAQ requested an extension of the comment deadline on the proposed Transport Rule and the NODA until November 30, 2010 to allow for a more thorough review of new technical information and development of detailed,

constructive comments that may be useful to EPA in finalizing the proposed rule. Because EPA has not extended the comment deadline, WVDAQ will submit time-constrained comments on the Transport Rule Notice of Data Availability by October 15, 2010.

West Virginia appreciates the opportunity to comment on the Proposed Transport Rule.

Sincerely,

/s/ JOHN A. BENEDICT
JOHN A. BENEDICT
Director

JAB/jlm

PETITIONER'S BRIEF

No. 12-1183

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Clean Air Act, 42 U.S.C. 7401, *et seq.* (Act or CAA), requires the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation of a [NAAQS]," each State must adopt a state implementation plan (SIP) with "adequate provisions" that will, *inter alia*, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the NAAQS. 42 U.S.C. 7410(a)(1), (2)(D)(i)(I). If a State fails to submit a SIP or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1). The questions presented are as follows:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

2. Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate

air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDING

The following were parties in the proceedings in the United States Court of Appeals for the District of Columbia Circuit:

American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club, petitioners in this Court, were intervenors in support of the United States Environmental Protection Agency.

The United States Environmental Protection Agency ("EPA"), respondent in the D.C. Circuit, has filed a separate petition in this Court, which was also granted (No. 12-1182). The other named respondent in the court of appeals was EPA Administrator Lisa Perez Jackson. As of February 15, 2013, Ms. Jackson no longer holds that office. Regina McCarthy is the current Administrator.

Additional respondent-intervenors below in support of the United States Environmental Protection Agency, who are nominal respondents on review, are Calpine Corporation; City of Bridgeport, Connecticut; City of Chicago; City of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); City of Philadelphia; Commonwealth of Massachusetts;

District of Columbia; Exelon Corporation; Mayor and City Council of Baltimore; Public Service Enterprise Group, Inc.; State of Connecticut; State of Delaware; State of Illinois; State of Maryland; State of New York (in all but D.C. Cir. Nos. 11-1388 & 11-1395); State of North Carolina; State of Rhode Island; and State of Vermont.

Petitioners below, who are respondents in this Court, were AEP Texas North Company; Alabama Power Company; American Coal Company; American Energy Corporation; Appalachian Power Company; ARRIPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, d/b/a City Water, Light & Power; Columbus Southern Power Company; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP; Entergy Corporation; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Company; Gulf Power Company; Indiana Michigan Power Company; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Unified Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Company; Kenamerican Resources, Inc.; Kentucky Power Company; Lafayette Utilities System; Louisiana Chemical Association; Louisiana Department of Environmental Quality; Louisiana Public Service

Commission; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors; Mississippi Power Company; Mississippi Public Service Commission; Municipal Electric Authority of Georgia; Murray Energy Corporation; National Rural Electric Cooperative Association; Northern States Power Company (a Minnesota Corporation); Oak Grove Management Company LLC; Ohio Power Company; Ohio Valley Coal Company; Ohio American Energy Inc.; Peabody Energy Inc.; Public Service Commission of Oklahoma; Public Utility Commission of Texas; Railroad Commission of Texas; Sandow Power Company; South Mississippi Electric Power Association; Southern Company Service, Inc.; Southern Power Company; Southwestern Electric Power Company; Southwestern Public Service Company; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; State of Virginia; State of Wisconsin; Sunbury Generation LP; Sunflower Electric Power Corp.; Texas Commission on Environmental Quality; Texas General Land Office; Utility Air Regulatory Group; United Mine Workers of America; Utah America Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Case Metals Association; Wisconsin Electric Power Company; Wisconsin Paper Council,

Inc.; Wisconsin Manufacturers and Commerce; and Wisconsin Public Service Corp.

Intervenors in support of petitioners below, who are respondents or nominal respondents on review, were City of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only); San Miguel Electric Cooperative, and State of New York (D.C. Cir. Nos. 11-1388 & 11-1395 only).

RULE 29.6 DISCLOSURE STATEMENT

Petitioners American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club have no parent companies. Nor have any of them issued publicly held stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7 and may be found in the Appendix to the Environmental Protection Agency's petition for certiorari (hereinafter "Pet.App.") at 1a-116a.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. That court denied petitions for rehearing en banc on January 24, 2013. Pet.App. 1459a-1462a. The petition for certiorari was filed on March 29, 2013. This Court's jurisdiction rests upon 28 U.S.C. 1254(1).

STATUTES AND REGULATORY PROVISIONS INVOLVED

Section 110(a)(2) of the Clean Air Act, 42 U.S.C. 7410(a)(2), provides:

> Each implementation plan submitted by a State under this chapter ... shall ...
>
> (D) contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with

> respect to any such national primary or secondary ambient air quality standard. ...

Section 110(c), *id.* 7410(c)(1), provides:

> (1) The [EPA] Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—
>
> (A) finds that a State has failed to make a required submission ... or
>
> (B) disapproves a State implementation plan submission in whole or in part, unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

The Act's judicial review provisions state:

> Any petition for review ... shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day. *Id.* 7607(b)(1);
>
> Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment ... may be raised during judicial review. *Id.* 7607(d)(7)(B).

Other relevant provisions of the Clean Air Act may be found at Pet.App. 1463a-1498a. EPA's Cross State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) ("Transport Rule"), is reprinted at Pet.App. 117a-785a.

INTRODUCTION

Interstate pollution poses a distinct challenge for our federal system. Upwind States may lack incentives to control pollution insofar as it affects their neighbors, and downwind States lack the authority to regulate "persons beyond [their] control," *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907). Indeed, for many areas with difficulties attaining or maintaining the Act's health-based air quality standards, pollution from upwind States accounts for more than three-quarters of local air pollution concentrations.[1] Such pollution creates both public health and economic harms for downwind States, which may be forced to impose far more stringent, and expensive, controls than upwind neighbors.

Remedying interstate air pollution has therefore long been understood to be a special federal responsibility. Decades before Congress enacted the Clean Air Act, this Court explained that "[w]hen the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done," and then granted Georgia's "fair and reasonable

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[1] See, *e.g.*, C.A.App. 2457 (Air Quality Modeling TSD), JA 175-85 (Air Quality Modeling TSD, App. F).

demand" that its air "should not be polluted on a great scale" by States whose geographic position and climatological conditions permitted them to export air pollution. *Tennessee Copper*, 206 U.S. at 236; see also *Missouri v. Illinois*, 180 U.S. 208, 241 (1901); *Missouri v. Illinois*, 200 U.S. 496, 519 (1906).

Consistent with the national government's responsibility for preventing and resolving interstate conflicts, *cf.*, *e.g.*, U.S. Const., Art. I, Sec. 8, Cl. 3 (regulation of interstate commerce); Art. I, Sec. 10, Cl. 3 (Compact Clause); Art. III, Sec. 2 (jurisdiction over suits between States); Art. IV, Sec. 1 (Full Faith and Credit Clause), Congress repeatedly has enacted, and strengthened, interstate air pollution protections in clean air legislation adopted in 1963, 1967, 1970, 1977, and 1990. See *infra*, 8-10. The current version of the Clean Air Act contains a "Good Neighbor" provision prohibiting air pollution that "contributes significantly" to nonattainment or "interferes with maintenance" of air quality standards in downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I); see also *id.* 7426(b).

EPA adopted the Transport Rule pursuant to the Good Neighbor provision in order to address interstate pollution that is a major cause of failures to attain and maintain health-based air quality standards. The agency crafted the Rule specifically to respond to shortcomings the D.C. Circuit had identified in a predecessor rule adopted in 2005. The Rule is projected to have very extensive public health benefits and to help resolve air quality

problems for many downwind areas, in accord with statutory attainment deadlines and prior D.C. Circuit instructions specifically directing that EPA act expeditiously to provide downwind States timely relief. In the decision below, a divided panel of the D.C. Circuit vacated this major rule.

In so ruling, the court below abandoned its proper review task. Inverting the proper role of a court under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-45 (1984), the majority imposed its own detailed judicial requirements for Good Neighbor rules, ones not compelled by anything in the ambiguous statutory text and unsuited to the realities of the air pollution problem the provision addresses. In doing so, the court entertained (and raised *sua sponte*) objections to EPA's rule that had not been raised in the administrative proceedings.

The majority below also defied plain statutory text in invalidating EPA's federal implementation plans for the Transport Rule. The court's decision, effectively invalidating prior administrative actions, was beyond its jurisdiction. Moreover, its novel and highly consequential ruling that States lack any duty to submit plans until EPA issues a quantifying rule contravenes plain statutory language and diminishes the proper role of States under the Act.

The court of appeals majority's revisions of the statute would force EPA to follow unworkable judicial algorithms that Congress never enacted, make interstate transport regulation an endless cycle of delay and failure, and thwart timely

attainment of the nation's health-based air quality standards.

STATEMENT OF THE CASE

A. Statutory Background

In the Clean Air Act, Congress adopted a "comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). The Act aims "to guarantee the prompt attainment and maintenance" of health-based air quality standards. *Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). EPA is required to list air pollutants that "may reasonably be anticipated to endanger public health or welfare" and to promulgate national ambient air quality standards (NAAQS) for such pollutants. 42 U.S.C. 7408(a), 7409(a); *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 462-63 (2001). States then have a responsibility to submit to EPA state implementation plans (SIPs) adequate to maintain air quality in areas that are meeting standards and to bring "nonattainment" areas into attainment status by specified dates (and in all cases as "expeditiously as practicable"). See, *e.g.*, 42 U.S.C. 7502(a)(2)(A), 7511(a)(1), 7513(c); *Train v. NRDC, Inc.*, 421 U.S. 60, 66 (1975) (characterizing this timely attainment obligation as the "heart" of the Act).

"[W]ithin 3 years (or such shorter period as the Administrator may prescribe)" after the promulgation or revision of a NAAQS, States are

obligated to submit to the Administrator a SIP that provides for "implementation, maintenance, and enforcement" of the NAAQS and satisfies other, specified statutory conditions. 42 U.S.C. 7410(a)(1), 7410(a)(2)(A). Among these conditions is the requirement that SIPs contain provisions adequate to ensure that sources within the State will not emit pollutants in amounts that "contribute significantly" to other States' nonattainment or that "interfere with" their maintenance of NAAQS. *Id.* 7410(a)(2)(D)(i)(I).

If a State fails to submit a SIP, or submits an inadequate one, EPA must make a finding of failure to submit or disapprove the submission. 42 U.S.C. 7410(k)(1), (3). The "Administrator shall promulgate a Federal implementation plan at any time within 2 years" of making such a finding or disapproval unless the State has addressed the problem and the EPA has approved the SIP. See *id.* 7410(c)(1).

Challenges to EPA's rulemakings must be filed within 60 days, *id.* 7607(b)(1), and "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment ... may be raised during judicial review," *id.* 7607(d)(7)(B). See also *id.* 7607(e) ("Nothing in this chapter shall be construed to authorize judicial review ... except as provided in this section.").

B. Interstate Air Pollution and the Act's "Good Neighbor" Provision

Over the last half-century, Congress has repeatedly enacted, revisited, and strengthened provisions intended to provide relief from interstate air pollution. See Pub. L. No. 88-206, §5, 77 Stat. 392, 396-99 (1963); Pub. L. No. 90-148, §2, 81 Stat. 485, 490, 494-96 (1967). See H.R. Rep. No. 90-728, at 12 (1967). Although the landmark 1970 amendments added a provision requiring SIPs to include "measures necessary" to "insure" against interference with attainment in downwind areas, Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1680-81 (1970), EPA, with court approval, interpreted the provision narrowly as requiring only "information exchange," among States. *E.g., NRDC, Inc. v. EPA*, 483 F.2d 690, 692-93 (8th Cir. 1973).

Concluding that "[t]he problem of interstate air pollution remains a serious one that requires a better solution," H.R. Rep. No. 95-294, at 329-330 (1977), Congress in 1977 amended the Act to require that each SIP contain adequate provisions prohibiting emissions from "any stationary source within the State ... which will ... prevent attainment or maintenance by any other State of any [NAAQS]," Pub. L. No. 95-95, §108(a)(4), 91 Stat. 685, 693 (1977), and to authorize EPA to impose emissions limitations directly upon stationary sources emitting pollutants across State boundaries, *id.* §123, 91 Stat. at 724. The 1977 Amendments reflected Congress's recognition that weak regulation had "result[ed] in serious inequities

among several States"—*i.e.*, that "[i]n the absence of interstate abatement procedures," plants in downwind States were "at a distinct economic and competitive disadvantage"—and were "intended to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, at 41-42 (1977).

Even after these amendments, however, federal statutory remedies for interstate pollution continued to be inadequate. Due in part to the absence of remedies for "states affected by numerous sources," Kay M. Crider, *Interstate Air Pollution: Over A Decade of Ineffective Regulation*, 64 Chi.-Kent L. Rev. 619, 637-38 (1988), and the restrictive "prevent attainment" language, States' efforts to obtain Good Neighbor relief proved uniformly unsuccessful. See, *e.g.*, *Connecticut v. EPA*, 696 F.2d 147, 152 (2d Cir. 1982); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071, 1094-95 (6th Cir. 1984); *New York v. EPA*, 852 F.2d 574, 581 (D.C. Cir. 1988) (R.B. Ginsburg, J., concurring) ("As counsel for the EPA acknowledged at oral argument, the EPA has taken *no* action against sources of interstate air pollution under either § 126(b) or § 110(a)(2)(E) in the decade-plus since those provisions were enacted.") (emphasis in original).

Determining that "additional efforts" were needed to address the "transport problem," see S. Rep. No. 101-228, at 48 (1989), Congress amended

the Good Neighbor provision into its current form in 1990, requiring that each state implementation plan:

> (D) contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source *or other type of emissions activity* within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) *contribute significantly* to nonattainment in, or *interfere with maintenance* by, any other State with respect to any such national primary or secondary ambient air quality standard. ...

42 U.S.C. 7410(a)(2)(D) (emphasis added).

As with other SIP requirements, States' Good Neighbor plans must be submitted to EPA within three years of the promulgation of a new or revised NAAQS. 42 U.S.C. 7410(a)(1), 7410(a)(2)(D).

Under the Act, each State remains responsible for complying with air quality standards by the statutory deadlines even if much of its local air pollution originates out of State. See *Sierra Club v. E.P.A.* 294 F.3d 155, 160-62 (D.C. Cir. 2002) (holding that EPA was without authority to grant extension from nonattainment deadline in 42 U.S.C. 7511(a)(1) on basis of "setbacks owing to [interstate] ozone transport"); *Sierra Club v. EPA*, 311 F.3d 853, 860 (7th Cir. 2002); *Sierra Club v. EPA*, 314 F.3d 735, 741 (5th Cir. 2002). See also *Southwestern*

Pennsylvania Growth Alliance v. Browner, 121 F.3d 106, 115-17 (3d Cir. 1997) (Alito, J.) (upholding EPA's refusal to redesignate nonattainment area in Western Pennsylvania despite argument that much of area's ozone pollution was attributable to pollution transported from other States, including agency's conclusion that origin of pollution was "legally irrelevant" to attainment status); *id.* at 124 (Becker, J., concurring) (lamenting circumstances of locality "whose herculean and largely successful efforts to combat air pollution may be derailed due to circumstances (upwind ozone) beyond its control").

C. Prior Transport Rules and Judicial Decisions

In response to upwind States' failure to address substantial interstate contributions to persistent downwind non-attainment and the development of better modeling techniques, EPA promulgated a series of regulations addressing interstate transport and quantifying minimum obligations of States under the Good Neighbor provision.

The NO_x SIP Call and *Michigan*. The first of these rulemakings was the 1998 NO_x SIP Call, which required 22 upwind States to revise their SIPs under 42 U.S.C. 7410(k)(5) to address their interstate contributions to downwind States' ozone pollution by reducing emissions of nitrogen oxides ("NO_x," an ozone precursor), and established an emissions trading program. 63 Fed. Reg. 57,356, 57,358-59 (Oct. 27, 1998). EPA relied upon recommendations and air quality modeling from the

Ozone Transport Assessment Group, a collaboration of 37 States, EPA, and industry and environmental groups. *Id.* at 57,361. The agency found that interstate pollution was the "major reason" some States failed to timely attain the ozone NAAQS. *Id.* EPA identified upwind States' "significant contributions" to downwind nonattainment based on upwind emissions' "ambient impact downwind," as well as on "the costs of the upwind emissions reductions," *id.* at 57,376. Upwind States were required to achieve emissions reductions that could be obtained through adoption of "highly cost-effective" controls, set at $2000/ton of NO_x reduced (in 1990 dollars). *Id.* at 57,377-78, 57,399-403. EPA explained: "When upwind emitters exacerbate their downwind neighbors' ozone nonattainment problems, and thereby visit upon their downwind neighbors additional health risks and potential clean-up costs, EPA considers it fair to require the upwind neighbors to reduce at least the portion of their emissions for which highly cost-effective controls are available." *Id.* at 57,379.

In *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), the D.C. Circuit upheld the NO_x SIP Call in relevant part. The court concluded that EPA's reliance upon control costs rested upon a permissible construction of the statute's "ambiguous" language, explaining that "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension." *Id.* at 679.

CAIR and *North Carolina*. States were obligated to submit plans to meet their good neighbor obligations for the 1997 ozone and 1997 fine $PM_{2.5}$ NAAQS by 2000, but none did. In 2005, EPA issued a nonsubmittal notice that "start[ed] a 2-year clock for promulgation by EPA of a FIP, in accordance with section 110(c)(1)." 70 Fed. Reg. 21,147, 21,151 (Apr. 25, 2005). A few weeks later, EPA promulgated the Clean Air Interstate Rule (CAIR), requiring 28 States to reduce their emissions of NO_x (a precursor of particulate pollution, as well as ozone) and sulfur dioxide (SO_2, a particulate precursor), 70 Fed. Reg. 25,162 (May 12, 2005), and establishing a regional emissions trading program, *id.* at 25,274.[2]

The D.C. Circuit set aside CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam), on reh'g, 550 F.3d 1176 (D.C. Cir. 2008), holding that, in multiple respects, the rule gave downwind States insufficient protection. The court ruled that CAIR's emissions trading rules failed to assure that each upwind State would, in fact, eliminate its significant contributions. *Id.* at 907-08. The court also held that EPA had "ignored its

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[2] A number of States submitted SIPs based on CAIR, which EPA subsequently approved, while States that chose not to submit SIPs remained under EPA's CAIR FIP. C.A.App. 3167-78. See also EPA, Transport Rule Primary Response to Comments at 71 (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513 (hereinafter "Primary RTC") (available at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4513); Pet.App. 177a.

statutory mandate" to harmonize CAIR with downwind States' statutory NAAQS-compliance deadlines, *id.* at 908-12, and that the rule failed to give independent effect to the statute's prohibition of emissions that "interfere with maintenance" in downwind areas, *id.* at 908-11. *North Carolina* did not disturb *Michigan's* acceptance of EPA's consideration of control costs in determining each State's "significant contribution" responsibilities. See *id.* at 917.

Having initially vacated CAIR, the *North Carolina* panel upon rehearing decided, in light of the rule's health benefits, to leave it in place on remand, while ordering EPA expeditiously to remedy its "fundamental flaws." 550 F.3d at 1178. The court "remind[ed]" EPA that it did not intend to "grant an indefinite stay of the effectiveness of this court's decision," and noted petitioners' right to "bring a mandamus petition to this court in the event that EPA fails to modify CAIR in a manner consistent with our July 11, 2008 opinion." *Id.* [3]

D. The Transport Rule

After *North Carolina*, EPA faced both a time-limited statutory duty under Section 110(c) and a court-issued directive to ensure prompt compliance with Good Neighbor provisions in time to meet

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[3] In accord with the D.C. Circuit's order leaving CAIR in effect on an interim basis, after the *North Carolina* decision, EPA "approv[ed] State SIP revisions that [were] consistent with CAIR" for 6 states. 74 Fed Reg. 27,731, 27,734 (June 11, 2009); C.A.App. 3167-78.

downwind attainment deadlines for the *1997* NAAQS, some of which had already passed.[4] And in June 2010, EPA had found that 23 States had failed to submit interstate transport plans satisfying the *2006* "24-hour" $PM_{2.5}$ NAAQS, 75 Fed. Reg. 32,673, 32,674 (June 9, 2010), triggering federal obligations for that air quality standard as well.[5] In response to these obligations and the D.C. Circuit's orders in *North Carolina*, EPA undertook the extensive technical analysis and administrative process that resulted in the Transport Rule.

In developing the Rule, EPA used air quality models to identify downwind air quality problems affected by interstate pollution transport and to quantify upwind States' obligations to reduce emissions of SO_2 and NO_x contributing to exceedances of the 1997 ozone and annual $PM_{2.5}$ standards and 2006 daily $PM_{2.5}$ NAAQS. Relying on emissions data from the National Emissions Inventory, EPA used the Comprehensive Air

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[4] The attainment deadline for the 1997 $PM_{2.5}$ NAAQS was 2010 with a possible extension to 2015; for the 1997 ozone NAAQS deadlines were 2007, 2010, or 2013, depending on nonattainment status. In all cases States have a statutory obligation to meet deadlines as "expeditiously as practicable." See *North Carolina*, 531 F.3d at 911; Pet.App. 449a-453a.

[5] By August 2011, EPA had disapproved SIPs from 11 additional States whose SIPs did not satisfy the Good Neighbor requirement. Pet.App. 177a-183a (summarizing these actions).

Quality Model with Extension (CAMx)[6] to simulate $PM_{2.5}$ and ozone concentrations in the eastern U.S. in the 2005 base year, 2012, and 2014, and identify locations expected to be in nonattainment or have maintenance problems for $PM_{2.5}$ and ozone in those years absent any further transport regulation. C.A.App. 2409-13 (Air Quality Modeling Technical Support Document[7]). CAMx also provided EPA with estimated contributions of individual upwind States at each downwind location projected to have nonattainment or maintenance problems. *Id.* 2435. EPA then used the Integrated Planning Model (IPM)[8], to analyze the SO_2 and NO_x emissions reductions available from power plants (also known as electric generating units, or EGUs) in each affected upwind State, using various control cost thresholds. C.A.App. 2933 (Significant Contribution TSD). Taking projected emissions data from the IPM modeling, EPA then used CAMx modeling and another model, the Air Quality Assessment Tool, to estimate downwind air quality

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[6] CAMx simulates the formation, transport, and deposition of $PM_{2.5}$, ozone, and their precursor pollutants (SO_2 and NO_x) on national, regional, and local scales. C.A.App. 2413.

[7] Throughout, "TSD" abbreviates "Technical Support Document."

[8] IPM is a model of the U.S. electric power sector that EPA, States, and industry use to analyze cost and emissions impacts of environmental policies and market decisions. See C.A.App. 2933. Taking into account operating and regulatory constraints such as emission limits, transmission capabilities, and fuel market conditions, IPM predicts how power plants will be utilized over a specified period of time. See *id.* 2339.

impacts under different regulatory scenarios. *Id.*, C.A.App. 2945-46 (Significant Contribution TSD).

EPA found that "that the total 'collective contribution' from upwind sources represents a large portion of $PM_{2.5}$ and ozone" measured by receptors in downwind nonattainment areas and that this transported pollution came from "numerous upwind States." Pet.App. 257a. Referring to its modeled results for 2012, EPA reported that:

> [T]he amount of transport from upwind States comprises a very large portion of the concentration at the 8-hour ozone, annual $PM_{2.5}$ and 24-hour $PM_{2.5}$ nonattainment and maintenance sites. For ozone, more than 90 percent of the concentration at the Allegan, MI, Fairfield County, CT and New Haven County, CT receptors is due to transport from upwind States. ... For annual $PM_{2.5}$, 60 to 70 percent of the concentration is due to upwind transport at all receptors, except for Jefferson County, AL where transport is somewhat less, but still substantial at 45 to 50 percent. The amount of $PM_{2.5}$ due to transport is 60 to 80 percent of the concentration at a majority of the 24-hour $PM_{2.5}$ receptors.

C.A.App. 2457 (Air Quality Modeling TSD).

EPA identified emission reductions required from 27 upwind States to eliminate significant contribution to nonattainment and interference with maintenance with respect to the 1997 ozone, 1997 annual $PM_{2.5}$, and 2006 daily $PM_{2.5}$ NAAQS.

See Pet.App. 117a. EPA adopted "a two-step approach to measuring each State's significant contribution," which was "based on the approach used in CAIR and the NO_x SIP Call but modified to address the concerns raised by" the D.C. Circuit in *North Carolina*. C.A.App. 24 (proposed rule); see Pet.App. 135a (final rule). First, based on transport modeling and monitoring data, the agency conducted a screening analysis that excluded many States from regulation: If a State's contributions to air quality monitors in downwind nonattainment and maintenance areas did not exceed one percent of the relevant NAAQS at any monitor, it was not subject to the Rule. Pet.App. 136a-183a, 255a-259a. Upwind States whose emissions exceeded that threshold amount would be "considered 'linked' to those [downwind] sites for the purpose of the second step in the analysis." C.A.App. 24.

In the second step, EPA identified "the portion of each State's contribution that constitutes its 'significant contribution' and 'interference with maintenance" based upon a consideration of air quality and control costs:

> Air quality considerations in the assessment include, for example, how much air quality improvement in downwind States results from upwind State emission reductions at different levels; whether, considering upwind emission reductions and assumed local (in-State) reductions, the downwind air quality problems would be resolved; and the components of the remaining downwind air

> quality problem (*e.g.*, whether it is a predominantly local or in-State problem, or whether it still contains a large upwind component). Cost considerations include, for example, how the cost per ton of emission reduction compares with the cost per ton of existing federal and State rules for the same pollutant; whether the cost per ton is consistent with the cost per ton of technologies already widely deployed (similar to the highly-cost-effective criteria used in both the NO_x SIP Call and CAIR); and what cost increase is required to achieve additional meaningful air quality improvement.

Pet.App. 350a-351a.

In contrast to the two prior regional transport rules, in which EPA had applied "a uniform remedy to all States found to have a significant contribution," in the Transport Rule EPA divided the significantly contributing States into "[t]hose whose significant contribution can be eliminated at a lower cost threshold; and those whose significant contribution is not eliminated ... until they reach the higher cost threshold." C.A.App. 24. For all covered NO_x States, and for one set of SO_2 contributors, EPA adopted a cost threshold of $500/ton; for another set of SO_2 States that were upwind contributors to more severe problems, EPA adopted a cost threshold of $500 for 2012 increasing to $2300/ton in 2014. Pet.App. 355a-358a. EPA found that the $500/ton level would largely reflect operation of existing pollution controls (which EPA

projected would be turned off absent CAIR or a substitute rule). *Id.* 463a-464a.

EPA provided for limited emissions trading in a program designed to conform to *North Carolina*'s requirement that such flexibility does not come at the expense of "all necessary reductions within [a] State." See *id.* 140a, 576a-580a.

During the rulemaking, EPA examined a number of possible approaches to defining upwind States' Good Neighbor responsibilities. See C.A.App. 90, 2307-20. For example, EPA considered approaches that would involve prohibiting all contributions above a fixed threshold, but concluded that, even at a much higher initial threshold, such approaches could mandate very large emissions reductions by some upwind States, *id.* 2309-10, and could lead to substantial "over-control"—*i.e.*, reductions "well beyond what would be needed for all of the downwind areas to attain [NAAQS]." *Id.* 2309. See also *id.* 2311-20 (discussing other possible methodologies).

Noting that it lacked authority to extend the deadlines set out in 42 U.S.C. 7410(c), Pet.App. 174a-175a, EPA implemented the Rule via federal implementation plans allocating emission allowances to power plants in the covered States, while providing that, beginning in 2014, States could submit SIPs that would modify or replace the federal plans. See *id.* 677a-680a.[9] EPA emphasized

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[9] Invoking its authority under section 110(k)(6), 42 U.S.C. 7410(k)(6), EPA also corrected its CAIR SIP approvals "to

that "[t]he [*North Carolina*] decision remanding CAIR without vacatur stressed the court's conclusion that CAIR was deeply flawed and emphasized EPA's obligation to remedy those flaws expeditiously." *Id.* 175a. See also *id.* 163a.

EPA projected that the Transport Rule would enable all downwind States to meet their 1997 $PM_{2.5}$ NAAQS attainment and maintenance obligations and almost all to meet their obligations for the 2006 $PM_{2.5}$ and 1997 ozone NAAQS. *Id.* 130a-131a. The agency also estimated that the reductions in $PM_{2.5}$ pollution under the Transport Rule would, starting in 2014:

> [A]nnually reduce between 13,000 and 34,000 $PM_{2.5}$-related premature deaths, 15,000 non-fatal heart attacks, 8,700 incidences of chronic bronchitis, 8,500 hospital admissions, and 400,000 cases of aggravated asthma while also reducing 10 million days of restricted activity due to respiratory illness and approximately 1.7 million work-loss days.

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rescind any statements" that such SIPs satisfied the statutory Good Neighbor requirements. Pet.App. 177a-178a. EPA explained that it had approved these SIPs pursuant to the *North Carolina* remand and that the SIPs had "remained in place for the limited purpose [of] achiev[ing] interim reductions until EPA promulgated a rule to replace CAIR," and, per *North Carolina*, that these plans did not satisfy States' *statutory* obligations. See *id.* 173a-174a. The court below did not reach challenges to EPA's section 110(k)(6) actions. See *id.* 49a n.29.

Id. 602a. EPA determined that "the annual net benefit (social benefits minus social costs)" of the Transport Rule in 2014 would be $110 to $280 billion, with compliance costs totaling $1.85 billion in 2012 and decreasing to less than $1 billion in 2014. *Id.* 610a-611a.[10]

E. Proceedings on Judicial Review

A divided D.C. Circuit panel granted petitions for review from upwind States and industry and vacated the Transport Rule. The court interpreted the Act and *North Carolina* as creating a set of "red lines," Pet.App. 22a, limiting EPA's authority and held that the Rule transgressed each of these. The "most fundamental[]" problem, according to the majority, was the possibility the restrictions imposed by the Rule in the second step of EPA's methodology "could require upwind States to reduce emissions by more than the amount" EPA had used in the first step to exclude States from program coverage, *id.* 31a, 35a, *i.e.*, to require abatement of contributions that were less than one percent of the NAAQS in the relevant downwind State. *Id.* 31a-36a. In a lengthy footnote, *id.* 32a-34a n.18, the majority rejected EPA's submission that this statutory argument was barred by 42 U.S.C.

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[10] This calculation of benefits and costs was based upon conditions expected to prevail in the absence of CAIR. EPA explained that "because the Transport Rule will replace CAIR, EPA cannot consider reductions associated with CAIR in the 'base case' (*i.e.*, analytical baseline emissions scenario)." Pet.App. 191a.

7607(d)(7)(B) because no one raised it in the administrative proceedings.

The majority next concluded that the Rule violated "the statute's proportionality requirement," because, in the court's view, EPA had "made no attempt to calculate upwind States' required reductions on a proportional basis that took into account contributions of other upwind States to the downwind States' nonattainment problems." Pet.App. 38a-39a. In addition, the majority concluded that the Rule "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." *Id.* 39a.

The majority held that the Rule was also invalid because EPA had implemented it by means of federal implementation plans. In the panel's view, EPA's prior administrative actions determining that States had not submitted valid transport plans did not provide authority for federal action because, "a SIP cannot be ... deemed deficient for failing to implement the good neighbor obligation until after EPA has defined the State's good neighbor obligation." *Id.* 31a.

Judge Rogers (who had joined and co-authored both the *Michigan* and *North Carolina* opinions) filed a comprehensive dissent faulting the majority for "disregard[ing] limits placed on its jurisdiction, the plain text of the Clean Air Act, and the [D.C. Circuit's] settled precedent interpreting the same statutory provisions at issue." *Id.* 65a.

SUMMARY OF ARGUMENT

EPA promulgated the Transport Rule years after States had failed to meet their obligations to limit emissions that "contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." 42 U.S.C. 7410(a)(2)(D)(i)(I). The Rule reflects EPA's extensive experience, over the last three Administrations, in crafting remedies for regional air pollution problems. Its objective—eliminating pollution that impedes attainment and maintenance of health-based air quality standards—is the core goal of the Clean Air Act, and the massive health benefits this Rule is projected to provide, see Pet.App. 601a-609a, testify to its vital importance.

In striking down the Rule, the court of appeals exceeded clear limits on its review authority. First, its main bases for condemning EPA's methodology consisted of statutory objections that had not been "raised with reasonable specificity during the period for public comment," and therefore could not be "raised during judicial review." 42 U.S.C. 7607(d)(7)(B). That limit is central to the Act's carefully wrought regime of judicial review and reflects the need for reviewing courts to have the benefit of the agency's judgments on technical and complex matters of pollution control law and policy.

The hazards of disregarding exhaustion requirements are illustrated pointedly here: The court's "most fundamental[]" statutory concern—the possibility that the second step of EPA's methodology could require upwind States to reduce

emissions below the one percent screening threshold—was neither raised by any commenter nor demonstrated in the record. Likewise, it was for good reason the court's "proportionality" requirement was not advocated by any commenter in the administrative proceedings; it has no textual basis and fails abjectly under real-world conditions.

The court of appeals' merits ruling disapproving the Rule's measure of "significant contribution" abandoned basic principles governing judicial review of administrative action. EPA's interpretation of the Good Neighbor provision's ambiguous language and its carefully considered approach to this complex problem merited deference from the court. The agency's designation as "significant" those "amounts" of air pollution emitted from an upwind State that contribute to downwind nonattainment problems and can be eliminated via widely available, low-cost emissions controls, is consistent with the statutory text. Moreover, it was carefully designed to work in real-world conditions marked by complex multistate transport linkages and an interconnected and interdependent power sector. Contrary to the majority's statements, EPA plainly did recognize the limits of its authority under the Good Neighbor provision and fully recognized that the provision does not excuse downwind States from their own obligations to meet air quality standards.

The court's "over-control" discussion simply disregarded EPA's diligent efforts to calibrate the Rule's requirements to the demonstrated scope of

projected downwind nonattainment and maintenance problems. The opinion's invalidation of the Rule in favor of an impromptu judicially crafted rulebook was the clearest possible violation of *Chevron* and its progeny.

In overturning EPA's federal implementation plans and denying States' independent obligations under the Good Neighbor provisions, the court of appeals ignored plain statutory meaning, transgressed limits on its own jurisdiction, and subverted federalism principles. Under the plain terms of the Act, each State has an obligation, within three years of issuance of a new NAAQS, to submit a plan demonstrating that it will not contribute significantly to nonattainment or interfere with maintenance of air quality standards in downwind States. None did so for any of the three NAAQS at issue here. EPA formally noted that failure to submit, triggering an obligation under 42 U.S.C. 7410(c)(1), to issue, within a specified time, federal plans fulfilling the Good Neighbor obligations.

The court of appeals' ruling that the agency was *precluded* from issuing federal plans until the agency had first quantified upwind States' obligations and allowed yet another opportunity for submission of SIPs violates the plain language of the statute. EPA may escape its FIP duty only if "the State corrects the deficiency," and EPA approves the State plan, see 42 U.S.C. 7410(c)(1), an exception inapplicable here. The court lacked authority to rewrite the statute and create an

exemption from EPA's duty that Congress chose not to adopt.

The majority below also transgressed explicit statutory limits on its jurisdiction by declaring invalid EPA's prior administrative actions finding State submissions inadequate or absent. Under the Act, those separate actions could only be challenged by petition for review filed within 60 days of publication.

The basis on which the court declared those prior actions invalid contravened the plain statutory text and longstanding practice. Each State's obligation to submit adequate Good Neighbor plans is explicit and unambiguous: Congress used the word "shall" to describe the States' obligation to submit SIPs. 42 U.S.C. 7410(a)(1). And section 7410(a) is unambiguous about what triggers the States' obligation to submit Good Neighbor SIPs: "the promulgation of a national primary ambient air quality standard (or any revision thereof)."

The court's insertion of an extra-statutory step into the Good Neighbor SIP process seriously disrupts a carefully wrought allocation of responsibilities in which the federal and State roles are triggered by and subject to a series of explicit duties and deadlines. In this and other respects, the decision grievously impedes achievement of the Act's overriding purpose—timely attainment of health-based air quality standards.

I. THE COURT OF APPEALS EXCEEDED ITS AUTHORITY AND ERRED IN SETTING ASIDE EPA'S METHODOLOGY FOR DEFINING STATES' SIGNIFICANT CONTRIBUTIONS TO DOWNWIND NONATTAINMENT

A court of appeals' role in reviewing a rulemaking is limited. First, a court is authorized to consider only those objections that were "raised with reasonable specificity during the period for public comment." 42 U.S.C. 7607(d)(7)(B). Second, an agency's interpretation of an ambiguous provision "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-18 (2009) (emphasis in original) (citing *Chevron*, 467 U.S. at 843-44).

By invalidating EPA's methodology for determining States' "significant contributions" to downwind nonattainment, the court of appeals transgressed these limits, entertaining objections that were never raised during the administrative process and imposing its own interstate pollution control regime in place of the agency's reasonable and carefully considered implementation of ambiguous statutory language.

A. The Court of Appeals Exceeded Statutory Limits on Its Review Authority

The exhaustion requirement in 42 U.S.C. 7607(d)(7)(B) is central to the Act's detailed judicial review regime. As this case demonstrates, Clean Air Act rulemakings often involve multi-dimensional policy questions, complex scientific and technical analyses, and thousands of public comments. "Exhaustion concerns apply with particular force ... when the agency proceedings in question allow the agency to apply its special expertise." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (citing *McKart v. United States*, 395 U.S. 185, 194 (1969)). *Cf. Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011) ("the first decider under the Act is the expert administrative agency, the second, federal judges"). The need to adhere to statutory exhaustion rules is vital to the integrity and fairness of the administrative process—and to informed judicial review. See *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 764-765 (2004); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 462 (D.C. Cir. 1998). The special force of these concerns in Clean Air Act rulemakings is highlighted by Congress's provision that, even when a party can show it was "impracticable" to raise an objection during the comment period, the party still may not go directly to court, but must first seek administrative reconsideration. 42 U.S.C. 7607(d)(7)(B); see also H.R. Rep. No. 95-294, at 323 (1977) ("Even in such cases, ... the Agency must

first be given an opportunity to pass on the significance of the materials.").

The methodology for defining significant contribution was a central issue before the agency, and EPA described its proposed approach in great detail in the proposed rule, C.A.App. 20-90. Furthermore, although EPA set out numerous alternative approaches, *id.* 90; *id.* 2306-20, none of the myriad participants in the Transport Rule rulemaking argued that the Act required EPA to adopt one of these alternatives (including the "air quality only" and "proportional" approaches the panel majority apparently favored, Pet.App. 33a n.18, 40a n.24). No participant challenged the reasons EPA had offered for rejecting these and other alternative methodologies. See Primary RTC 733-34. Nor did anyone object that the statute mandated some other methodology that EPA had not considered in its canvass of alternatives.[11]

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[11] Many features of the rulemaking were intensely contested, but the quiescence of regulated entities and upwind States regarding EPA's "significant contribution" approach likely reflects the fact that the Rule's architecture—including its focus on cost-effectiveness and provisions for emissions trading—serves to reduce compliance burdens for upwind States and sources located there, relative to alternative approaches. *Cf. Michigan*, 213 F.3d at 675-77 (noting limited nature of challenges to features of program that generally mitigated burdens on upwind States). Furthermore, parties opposing EPA's approach would have had some obligation to suggest reasonable, workable alternatives. See *id.* at 679 (challengers failed to offer any "material critique" of EPA's reasons for rejecting alternative methodologies).

The "One Percent Threshold" Objection. No participant in the rulemaking raised what the majority opinion would later assert was the Transport Rule's "most fundamental[]" statutory flaw, see Pet.App. 31a—namely, that the emission reduction obligations defined pursuant to the second step of EPA's methodology could, in theory, "require upwind States to reduce emissions by more than the amount" (one percent of the NAAQS) EPA had used to exclude States from program coverage in the first step. *Id.* 35a. Accordingly, under the plain terms of 42 U.S.C. 7607(d)(7)(B), this objection could not "be raised during judicial review."

None of the grounds offered in the panel's lengthy footnote on exhaustion, see *id.* 32a-34a n.18, withstands scrutiny. Indeed, treated as precedent, the footnote would nullify the statutory exhaustion requirement. For example, neither the fact that the prior interstate transport proceedings had involved the question "whether EPA has complied with the basic statutory limits on its authority," *id.*, nor the presence in *North Carolina* of standard "consistent with this opinion" remand language remotely satisfied the statutory requirement that objections be raised with "reasonable specificity" during the comment period. Comments made years earlier in the CAIR rulemaking were likewise insufficient. See 42 U.S.C. 7607(d)(3), 7607(d)(4)(B). "[O]bjections raised at the wrong time or in the wrong docket will not do." *Appalachian Power Co. v. EPA*, 251 F.3d 1026, 1036 (D.C. Cir. 2001).

That EPA, in its discussion of policy alternatives, *supra*, 19-20, had addressed "two air quality only approaches" (Pet.App. 33a n.18; see C.A.App. 2308-12) by no means authorized the panel to overlook the challengers' failure to raise their distinct, *statutory* theories "during the period for public comment." 42 U.S.C. 7607(d)(7)(B). *See also Lake Carriers' Ass'n v. EPA*, 652 F.3d 1, 7-8 (D.C. Cir. 2011) (citing voluminous D.C. Circuit precedent confirming that failure to raise particular textual objection constitutes forfeiture). No commenter supported any of these alternatives, let alone argued that they were mandated by statute. To the extent the panel majority meant to suggest that objections would have been *futile*, the absence of such an exception in this statute is dispositive. See *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001). In any event, the suggestion is unsupported by any evidence, let alone "most exceptional circumstances" demonstrating "certain" administrative rejection, *Tesoro Refining & Marketing Co. v. FERC*, 552 F.3d 868, 874 (D.C. Cir. 2009).[12]

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[12] The only two actual rulemaking comments cited in the majority's footnote were also patently insufficient. See Pet.App. 98a-101a (dissent). Wisconsin's comment nowhere mentioned the threshold-exceedance concept, instead advocating more stringent and expeditious controls on upwind States and maintaining that EPA needed "to primarily depend on air quality results instead of control costs." See C.A.App. 1293. Tennessee's comment merely stated that a "lower cost threshold *should be considered* for any State that can reduce their contribution below 1% significance using cost thresholds below the maximum values," C.A.App. 556 (emphasis added),

The circumstances here vividly illustrate the hazards of bypassing exhaustion requirements. The panel overturned EPA's rule not because it found that the agency's methodology *actually* required even a single upwind State to reduce emissions below the one percent threshold the majority deemed a "red line," Pet.App. 22a; rather, for the majority, it was fatal that the Rule "*could* require upwind States to reduce emissions by more than the [initial threshold] amount." See, *e.g.*, *id.* 35a. (emphasis added). But precisely because no participant in the rulemaking raised the objection, EPA had no reason to address whether, in fact, the panel majority's "red line" would be crossed, or to address the legal or policy implications of the objection. See 42 U.S.C. 7607(d)(7)(B) (explicitly requiring petition for administrative reconsideration even when litigant had no opportunity to raise the objection during rulemaking). After the industry challengers presented the issue in their D.C. Circuit brief, EPA analyzed the record evidence and reported its conclusion that "such a scenario is extremely *unlikely* to occur," explaining that "even with all required reductions, all covered States except Maryland will remain at or above the one percent threshold for at least one of their annual $PM_{2.5}$ linkages," and that "Maryland's contribution to Lancaster, Pennsylvania with respect to daily $PM_{2.5}$ is so far above the threshold ... that there is no

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with no mention of any statutory basis for this policy suggestion, let alone any claim of statutory obligation.

reason to believe it would fall below that threshold after implementation of the Rule." Resp't Br., D.C. Cir. No. 11-1302 at 33-34 & n.20 (filed Mar. 1, 2012) (citing Annual $PM_{2.5}$ Air Quality Assessment Tool, C.A.App. 2986-92; Air Quality TSD, App. D, C.A.App. 2706-09).

The "Proportionality" Objection. Again exceeding its review authority, the D.C. Circuit ruled that the Good Neighbor provision includes a particular "fair share" requirement, under which abatement obligations "must be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment." Pet.App. 25a; see also *id.* 26a-27a & n.15 (giving example involving three upwind States contributing varying numbers of "units" of pollution to nonattainment in one downwind State).

This objection too was not raised in the administrative process, or even in the D.C. Circuit briefs, see *id.* 69a (dissent). The court of appeals majority said that EPA had considered "a proportional approach that reflected many of the essential principles described" in its opinion, but "ultimately chose not to adopt that approach." Pet.App. 40a n.24 (citing Alternative Approaches TSD, C.A.App. 2311-12). Unmentioned by the majority, however, were the facts that (1) no commenter in the rulemaking advocated that approach, let alone claimed it was required by statute, see *id.* 107a-108a (dissent); C.A.App. 1912-54; Primary RTC 733-34; and (2) EPA rejected this approach, prior to the comment period, for a variety

of reasons that were not challenged by any commenter, pointing out, *inter alia*, that the proportionality concept breaks down whenever more than one downwind State is involved. C.A.App. 90 (proposed rule's discussion of alternative approaches and reference to docketed technical support document concerning them, see *id.* 2306-2320).

B. The Court of Appeals' Requirements Lack Support in the Statutory Good Neighbor Provision

On their merits, the court of appeals' rulings are equally deficient. The Transport Rule presents a quintessential case for judicial deference. The statute does not prescribe a methodology for deciding whether interstate transport controls are "adequate" or for identifying the "significant" contributions to nonattainment that must be prohibited. As the D.C. Circuit observed in *Michigan*, the term "contribute significantly" is ambiguous and does not "convey a thought that significance should be measured in only one dimension." 213 F.3d at 677. "Significant" is not defined in the Act, and the "ordinary meaning," see *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012), is broad and synonymous with "notable" and "meaningful."[13] See *City of Arlington*

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[13] See *Webster's Dictionary* (2d International Unabridged Ed. 1948) (defining "significant" as "having a meaning" and "deserving to be considered"); *Webster's Third New International Dictionary* 2116 (2002) ("having meaning," "having or likely to have influence or effect"); *Oxford*

v. FCC, 133 S. Ct. 1863, 1868 (2013). ("Congress knows to speak ... in capacious terms when it wishes to enlarge[] agency discretion.").

The Good Neighbor provision calls for projections of whether emissions "will" contribute significantly to downwind nonattainment, and EPA's Rule used sophisticated modeling to project future emissions levels, pollution transport, and attainment status. C.A.App. 2406-77; *supra*, 15-16. This sort of "predictive judgment," see *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009), and "technical expertise," see *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989), warrants deference from reviewing courts, which "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Am. Elec. Power Co.*, 131 S. Ct. at 2539-40.

In striking down the Transport Rule and proposing its own rules for regulating interstate air pollution, the majority did "precisely what *Chevron* prevents," "'substituting [its] own interstitial lawmaking' for that of [the] agency," *City of Arlington*, 133 S. Ct. at 1873 (citation omitted). As the agency explained, implementation of the Good Neighbor provision "inherently involves a decision on how much emissions control responsibility

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English Dictionary (2d ed.1989) ("important," "notable"). *Cf. Nat'l Railroad Passenger Corp. v. Boston & Main Corp*, 503 U.S. 407, 423-24 (1992) (rejecting, as unduly "restrictive" and inconsistent with *Chevron*, D.C. Circuit's construction of phrase "significantly impair" in statute addressing conveyances of railroad property).

should be assigned to upwind States, and how much responsibility should be left to downwind States," and its methodology was intended to "assign a substantial but reasonable amount of responsibility to upwind States ... to control their emissions." C.A.App. 63.

EPA's designation as "significant" those "amounts" of air pollution emitted from an upwind State that contribute to downwind nonattainment problems and can be eliminated via widely available, low-cost emissions controls, is reasonable, fair, and easily consistent with the statute. As in the two prior regional transport rules, and after considering alternatives (none seriously advocated by any party here), EPA settled on an approach that employed control cost thresholds as tools to assess the consequences of different levels of control effort, and then, in light of the projected relationship between upwind controls and downwind air quality, as a basis for establishing upwind States' abatement obligations. Under EPA's approach, examination of control costs functioned, not as a counterweight to the statute's explicit and paramount health goals, but as a workable, sensible means to apportion and define contributing upwind States' Good Neighbor obligations and thereby facilitate NAAQS attainment. The Rule's use of cost is a fair, effective, and administrable means to allocate clean-up responsibilities among jointly responsible States.[14]

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[14] The panel majority mischaracterized *Michigan* as holding that, under the Good Neighbor provision, cost may be

One Percent Threshold. As demonstrated, the majority's principal concern—the possibility that EPA's approach could force upwind States' emissions below the one percent threshold used to identify program coverage—(1) was not raised in the rulemaking, and (2) was counterfactual, see *supra*, 30-33.

In any event, this objection lacks support in the statute. The statutory text does not address the methodology for identifying significant contributions to nonattainment and does not forbid separate tests for coverage and control obligations, even if States over the coverage threshold would thereby be required to reduce emissions to a level lower than the threshold (and if States just below the threshold would thereby be entirely exempted). It is hardly uncommon for a statute or regulation, for administrative efficiency or other reasons, to set a coverage threshold that excludes some actors or activities, but then to subject those above the

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considered only "to further lower an individual State's obligations," or "allow some upwind States to do *less* than their full fair share," Pet.App. 38a, by avoiding "exorbitant costs," *id.* 27a. That is not an accurate account of *Michigan*, see 213 F.3d at 679; Pet.App. 112a (Rogers, J.), or of the NO_x SIP Call's use of "highly cost-effective controls," see 63 Fed. Reg. at 57,378. Furthermore, a rule permitting consideration of costs to *weaken* Good Neighbor obligations would be questionable under *American Trucking Ass'ns*, 531 U.S. at 468-71, which confirmed that EPA may not consider cost in setting the health-based NAAQS under 42 U.S.C. 7409(b)(1); see also *id.* at 469 n.1 (citing *Michigan*). In contrast, the Transport Rule does not use cost as a basis to diminish or postpone the overriding statutory health objective, NAAQS attainment.

threshold to the plenary regulation without granting a pro tanto "credit." Any "line-drawing process" often involves "difficult choices," *City of Charlotte v. Local 660, Int'l Ass'n of Firefighters*, 426 U.S. 283, 288 (1976), and is normally a matter of agency discretion unless the lines drawn are "irrational" or the consequences "dire." *Leather Indus. of Am., Inc. v. EPA*, 40 F.3d 392, 409 (D.C. Cir. 1994). No such showing was made here.

Proportionality. The statute cannot reasonably be read to command that EPA adopt the court of appeals' "proportionality" or "statutory fair share," Pet.App. 39a, requirement. Nothing in the text requires EPA to treat physical quantities of emissions attributed to different upwind States as the only relevant consideration in defining their Good Neighbor responsibilities. Neither the statutory phrase "amounts which will ... contribute significantly," nor the judge-made concept of a "fair share," obligates EPA to treat relative physical contributions as the only factor relevant to States' Good Neighbor obligations. See, *e.g.*, C.A.App. 2312 (Alternative Approaches TSD) (approach requiring "the same percent reduction of existing emissions," would burden upwind States "that had previously implemented stringent control programs," relative to others that "had previously done little").

Unlike in the court's simple hypothetical, upwind States frequently contribute to nonattainment in multiple downwind States. *E.g.*, Pet.App. 286a-299a Tables V.D-5, V.D-6. In those circumstances, as a matter of sheer arithmetic,

there exists no unique "proportional" abatement solution. As EPA explained in discussing proportional approaches it had considered (but that no rulemaking commenter advocated): "most upwind States contribute to multiple downwind monitors (in multiple States) and would have a different reduction percentage for each one." C.A.App. 2311-12. Here, as elsewhere, the court set forth its own approach without engaging at all with EPA's explanation in the rulemaking the court ostensibly was "reviewing."

To be sure, a claim of unfair or unreasonable disparities among contributing States' obligations (if timely raised in comments), would demand a reasoned agency response. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983). But judicial review of such a claim under the "arbitrary and capricious" standard, 42 U.S.C. 7607(d)(9)(A), would require examining the legal and policy reasons given by the agency for its choices, its responses to objections properly raised in comments, and the feasibility and probable consequences of alternatives. The court below, in contrast, looked at none of this and failed to point to any concrete example of allegedly impermissible disparities in the Rule's treatment of the respective upwind States.

In its "proportionality" discussion, the court below also cursorily stated that EPA had "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." Pet.App. 39a. But EPA *repeatedly*

recognized downwind States' own obligations, and its methodology was specifically designed to balance fairly the obligations of upwind and downwind States. See, *e.g.*, *id.* 129a-120a ("Section 110(a)(2)(D)(i)(I) only requires the elimination of emissions that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in other States; it does not shift to upwind States the responsibility for ensuring that all areas in other States attain the NAAQS."); *id.* 350a [48,256] (rejecting calls for tighter ozone-season NO_x restrictions in part because "the mandate of section 110(a)(2)(D)(i)(I) is not to ensure that reductions in upwind States are sufficient to bring all downwind areas in to attainment, it is simply to ensure that all significant contribution to nonattainment and interference with maintenance is eliminated"); C.A.App. 17 ("EPA continues to conclude ... it would be difficult if not impossible for many nonattainment areas to reach attainment through local measures alone"); *id.* 2457 (Air Quality Modeling TSD) (showing in-State contribution to pollution concentrations in nonattainment areas is between 10-50% of total for ozone, 30-40% for 1997 annual $PM_{2.5}$ NAAQS, and 20-40% for 2006 daily $PM_{2.5}$ NAAQS). See also Primary RTC 380, 444, (C.A.App. 1689, 1753).

"Collective Over-Control." The panel majority's assertion that EPA "did not try to take steps to avoid ... over-control," Pet.App. 40a, is also simply wrong. In multiple ways, EPA crafted the Rule's requirements to secure needed reductions in interstate pollution transport while avoiding

excessive or unreasonable burdens on upwind States. For example, EPA projected current and future emissions levels and regulatory requirements, "analyz[ing] whether additional reductions are necessary beyond those already mandated by existing emission limitation requirements." *Id.* 190a. EPA rejected "significant contribution" metrics that it believed could result in "substantial over-control." C.A.App. 2311. The agency rejected suggestions that it use initial coverage thresholds lower than one percent of the NAAQS, concluding that the agency was "not convinced" lower thresholds were "necessary or desirable," in part because "the controls required under this rule are projected to eliminate nonattainment and maintenance problems with air quality standards at most downwind State receptors." Pet.App. 258a.

EPA projected that, even when the Transport Rule is fully implemented, some of the nonattainment areas the Rule is intended to benefit would remain in nonattainment. Pet.App. 131a, 232a, 313a; C.A.App. 2466, 2470 (Air Quality TSD) (five sites are projected to have 24-hour $PM_{2.5}$ issues post-implementation, while ten sites in two areas (Houston and Baton Rouge) will have ozone problems). See also *supra*, 33-34 (noting EPA's calculation that all covered States' contributions would, after implementation of Transport Rule controls, remain above the one percent applicability threshold).

Further undermining claims of unlawful stringency, the emissions reductions required of upwind States under the Rule are modest. EPA explained that cost thresholds *lower* than the $500/ton it settled on would provide an economic incentive to cease operating *existing* pollution controls and would—given that CAIR would cease to operate when the new rule went into effect—*increase* emissions and associated contributions to downwind nonattainment problems. See Pet.App. 354a. EPA determined that the $500/ton threshold for SO_2 "Group 2" States reflects "the cost at which EGUs operate all installed controls, continue to burn coals with sulfur contents consistent with what they were burning in 2009, and operate any additional controls they are currently planning to install by 2014." C.A.App. 2167. See *id.* (similar analysis for annual NO_x reductions). Once CAIR ceased to be in effect, "sources would have an economic incentive to discontinue operating installed controls, or to operate those controls less effectively," so EPA's analysis "treats the costs of operating controls installed to meet CAIR requirements as costs of meeting Transport Rule requirements." Pet.App. 197a.

The cost thresholds, moreover, are considerably lower than those employed in the NO_x SIP Call sustained in *Michigan*. The Transport Rule $500 thresholds (in 2007 dollars) are about one-sixth the NOx SIP Call threshold of $2000/ton (1990 dollars). Even the $2300/ton threshold for the "Group 1" States is about 28 percent lower in real terms than

the $2000 (1990 dollars) threshold in the NOx SIP Call.[15]

The Rule's modest requirements stand in marked contrast to far more demanding regulations in place in many downwind States, which have mandated controls on their own sources that are many times more stringent. See Primary RTC 278 (C.A.App. 1587) (comment of organization of Northeast States' air quality agencies, noting that downwind States "have already implemented successful programs at much greater per ton costs (some are even greater than $40,000/ton)"); *id.* 586 (comments of Maryland Department of the Environment criticizing $500/ton threshold and stating that "our own State is already enacting NO_x control measures at significantly higher costs"); *id.* 928 (New York agency's comment that "[i]t is certainly reasonable to require more effort from upwind States than the current $500/ton threshold requires, particularly when downwind States such as New York have required NO_x emissions reductions at values up to ten times of this amount and more for purposes of attaining the NAAQS"); *id.* 1230 (comments of the Connecticut Department of Environmental Protection, listing widely varying average NO_x emission rates for various States). Downwind states should not have

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[15] The Transport Rule's costs are also dwarfed by its benefits: Dividing the Rule's projected annual health and welfare benefits in 2014 ($110-$280 billion), Pet.App. 156a, Table III-4, by the Rule's projected SO_2 and NO_x reductions that year (4.2 million tons combined), Pet.App. 151a, Table III-2, yields a range of between $26,190 and $66,667 in benefits per ton.

to incur costs to clean up pollution from upwind states whose geographic position and climatological conditions permit them to export air pollution.

The majority's premise that the statute tolerates *under*-control of interstate pollution, Pet.App. 27a, 38a, but requires that the agency stop on a dime to avoid even the possibility of over-control, turns the Clean Air Act upside-down. Timely achievement of the health-based NAAQS is the very core of the Act. *Union Electric*, 427 U.S. at 249; *Train*, 421 U.S. at 79; see 42 U.S.C. 7410, 7502, 7511a. Evaluating the risk that regulatory limits will do more than necessary to control interstate pollution against the risk they will not do enough requires a "complex balancing," see *Am. Elec. Power Co.*, 131 S. Ct. at 2539, a job Congress assigned to agency policymakers. See *City of Arlington*, 133 S. Ct. at 1868.

Especially given courts' own "anything but smooth" efforts to develop workable rules for interstate pollution controversies, *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 501 (1971); see also *Missouri*, 200 U.S. at 519-20, and the "difficult technical problems" presented, see *City of Milwaukee v. Illinois*, 451 U.S. 304, 325 (1981), EPA's carefully considered implementation of the Good Neighbor provision deserved at least the measure of judicial deference regularly due on matters less clearly requiring agency judgment and expertise.

II. THE COURT ERRED IN OVERTURNING FEDERAL IMPLEMENTATION PLANS AND REPEALING STATES' STATUTORY RESPONSIBILITY TO SUBMIT GOOD NEIGHBOR PLANS

Acting on issues not before it, the court of appeals abrogated the States' obligation to submit Good Neighbor SIPs under 42 U.S.C. 7410(a), ignoring the plain meaning of the statute and subverting federalism principles. On this flawed basis, the court overturned EPA's federal implementation plans issued under section 7410(c).

A. In Abrogating the States' Statutory Good Neighbor Obligations, the Panel Transgressed Its Own Jurisdiction and the Plain Meaning of Section 7410(a)

1. Having Been Triggered by Separate EPA Actions, the States' Clear Obligation to Submit Good Neighbor SIPs Was Not Before the Panel

In striking down EPA's federal implementation plans, the panel reached beyond the substance of the rule before it to overturn administrative actions made, in many cases, years before, the majority of which were unchallenged, and for which no petition for review was before the panel.

The Act sets a 60-day deadline for challenging "any" final action by the Administrator. 42 U.S.C. 7607(b)(1); *Harrison v. PPG Indus.*, 446 U.S. 578, 589 (1980). In each of the triggering findings at issue here, EPA expressly reminded the public of

this sixty-day deadline. See, *e.g.*, 76 Fed. Reg. 43,128, 43,136 (July 20, 2011). No petition for review of any of the various triggering findings was before the panel below.[16]

The panel insisted it was not invalidating these threshold findings, but its opinion shows that it in fact did so. EPA's findings and disapprovals rested on the premise that States were obligated to submit SIPs satisfying Section 7410(a), including the Good Neighbor provisions, within three years of the promulgation of new or revised NAAQS. See, *e.g.*, 76 Fed. Reg. at 43,132. The panel held that the States' SIPs "*cannot* be deemed to lack a required submission" because EPA has not previously quantified or defined each State's Good Neighbor obligations. Pet.App. 8a-9a, 47a-48a (emphasis added).

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[16] See 70 Fed. Reg. 21,147 (nonsubmittal finding for 1997 ozone and $PM_{2.5}$ NAAQS covering all 50 States) (no petition for review filed); 75 Fed. Reg. 32,673 (nonsubmittal finding for 2006 $PM_{2.5}$ NAAQS covering 23 States, including 11 Transport Rule States) (no petition for review filed). Three States filed petitions for review of EPA's disapproval of their 2006 $PM_{2.5}$ Good Neighbor SIPs; none was consolidated with the proceedings below. See Pet.App. 74a n.5 (dissent). EPA did, in the Transport Rule, issue corrections to certain 1997 ozone and $PM_{2.5}$ Good Neighbor SIPs that had relied on CAIR. See *supra*, 12-14. Because the panel did not address challenges to those actions, they are not before this Court. See Pet.App. 48a-49a n.29. Even if they were, neither EPA nor a State could properly claim that a SIP resting on CAIR, held unlawful in *North Carolina*, satisfied the requirements of the Act.

The panel's rulings directly address—and undo—the core elements of EPA's triggering actions. Because those actions were not before the panel, it lacked authority to rule on them,[17] and this ground alone requires reversal of its decision.

2. On the Merits, the Panel Erred by Creating an Extra-Statutory Federal Predicate to States' Good Neighbor Obligations

Even if the Court were to reach the merits of EPA's triggering findings, the panel's ruling must be rejected. The panel claimed that a State need not submit a SIP satisfying 42 U.S.C. 7410(a)(2)(D)(i)(I) until EPA issues a rule quantifying or defining the State's Good Neighbor obligations. Pet.App. 8a-9a, 47a-48a. "[C]ourts must presume that a legislature says in a statute what it means," *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see also *Chevron*, 467 U.S. at 842-43. The statute's plain terms place on States the obligation to submit SIPs including Good Neighbor provisions within three years of establishment or revision of a NAAQS and direct EPA to promulgate a FIP within two years of finding a SIP is inadequate or not submitted. 42 U.S.C. 7410(a); *id.* 7410(c)(1). At a minimum, EPA's interpretation of these statutory requirements, one informed by the impending statutory deadlines and

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[17] See, *e.g.*, *Med. Waste Inst. v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (Section 307(b)(1) filing period is "jurisdictional").

the mandate in *North Carolina*, was a "reasonable" one entitled to judicial deference. *Chevron*, 467 U.S. at 845.

(a) Section 7410(a) Expressly Identifies States' Obligation to Submit Good Neighbor SIPs as Part of a Carefully Crafted Sequence of NAAQS Implementation Steps

The statute's wording confirms States' obligations to develop and submit Good Neighbor SIPs. First, Congress provided that States "shall" submit SIPs, 42 U.S.C. 7410(a)(1), and that those SIPs "shall" include Good Neighbor provisions. *Id.* 7410(a)(2). Congress knew how to provide that a State "may" take specified actions. *Id.* 7410(a)(5)(A)(i) ("Any State *may* include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program.") (emphasis added). See *Lopez v. Davis*, 531 U.S. 230, 241 (2001) (contrasting "permissive 'may'" with "mandatory 'shall'"); see also *City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 338 (1994).

Second, Congress emphasized the broad applicability of the SIP obligations by repeatedly using "any" and "each." 42 U.S.C. 7410(a)(1) (SIPs must be submitted for a NAAQS or "any" revision thereof); *id.* 7410(a)(2)(D)(i)(I) (Good Neighbor obligation applies to "any" such NAAQS); *id.* 7410(a)(1) (SIP submission obligations applies to "[e]ach" State); *id.* 7410(a)(2) ("Each" State plan

shall contain specified elements, including Good Neighbor provisions). See *Dep't of Hous. & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning") (citation and some internal quotation marks omitted); *Sierra Club v. EPA*, 536 F.3d 673, 678 (D.C. Cir. 2008) ("'Each' means '[e]very one of a group considered individually.'") (citation omitted).

Third, in enacting thirteen paragraphs specifying what "[e]ach" SIP "shall" include, 42 U.S.C. 7410(a)(2)(A) through (M), Congress connected them with the conjunctive "and," meaning that all thirteen items—including the Good Neighbor provision—must be included in a State's SIP. *Cf. Reynolds v. United States*, 132 S. Ct. 975, 984 (2012). When Congress intended States to condition their submittal on further EPA action beyond establishment or revision of a NAAQS, it stated so explicitly. See *id.* 7410(a)(2)(F) (SIP shall "require, as may be prescribed by the Administrator," that sources monitor and report emissions); *id.* 7410(a)(2)(K) (SIP shall "provide for ... the performance of such air quality modeling as the Administrator may prescribe"). Because Section 7410(a)(2)(D)(i)(I) contains no such condition, the court of appeals lacked authority to create one. See *Chicago v. Environmental Def. Fund*, 511 U.S. at 338.

Finally, Section 7410(a) expressly provides that it is "the promulgation of a national primary ambient air quality standard (or any revision thereof)"—and not, as the panel erroneously

concluded, some other action—that triggers the States' duty to submit SIPs containing Good Neighbor provisions satisfying Section 7410(a)(2)(D)(i)(I).

The court of appeals' insertion of a requirement that EPA issue a quantification or definition rule also subverts 42 U.S.C. 7410(a)'s tightly-drawn sequence of requirements, each accompanied by a deadline to ensure timely action. The Act was passed as "a drastic remedy to what [Congress] perceived as a serious and otherwise uncheckable problem of air pollution." *Union Electric*, 427 U.S. at 256. It "place[s] the primary responsibility for formulating pollution control strategies on the States, but nonetheless subject[s] the States to strict minimum compliance requirements." *Id.* at 256-57. Most crucially, States are to "attain air quality of specified standards, and to do so *within a specified period of time*." *Train*, 421 U.S. at 65 (emphasis added).

Congress established deadlines not just for attaining the NAAQS, but for the steps *leading up to* attainment—including the submission of State plans, 42 U.S.C. 7410(a)(1); EPA action on such plans, *id.* 7410(k)(1) through (3); and (if EPA disapproved or found a State had failed to submit a plan) promulgation of federal plans, *id.* 7410(c)(1). Because these deadlines are express statutory requirements, see *Union Electric*, 427 U.S. at 258-60; *North Carolina*, 531 F.3d at 912, the panel erred by adopting an interpretation conflicting with them. See, *e.g.*, *Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct.

1350, 1356 (2012) ("our task is to fit, if possible, all parts into an harmonious whole") (citation and internal quotation marks omitted).

The panel's ruling upends this crucial statutory architecture by inserting a non-statutory step, one that does not interrelate with those which *are* statutorily specified, and removes accountability that Congress carefully designed. Under the panel's holding, the agency and future courts are left without guidance to critical questions: By what date must EPA promulgate a quantification rule? What happens if the agency fails to do so? Would such failure excuse States' missing deadlines for plan submission and NAAQS attainment? Does the precondition requirement apply in situations of simple interstate transport or pollutants transported only over short distances? By severing Congress's carefully crafted linkage between each statutory implementation step, the panel's judicial improvisation invites delays in timely attaining the health-based air quality standards and securing attendant public health protections, complicates efforts of downwind States to craft timely SIPs, and places States not able to meet air quality standards by controlling in-state sources at risk of nonattainment sanctions.

This Court has described "the requirement that each State formulate ... an implementation plan designed to achieve [the NAAQS]" as the "heart" of the Act, *Union Electric*, 427 U.S. at 249, and found that "strict minimum compliance requirements" are "apparent on the face of Section 7410(a)," *id.* at 256-

57. The panel erred by undertaking a judicial rewrite.

(b) States Are Capable of Preparing Good Neighbor SIPs

The panel's ruling—that State Good Neighbor plans, or the failure to submit such plans, cannot be deficient until EPA quantifies or defines State obligations—presupposes that such an approach is necessary to avoid an "impossibility." Here too the panel erred.

A State need not solve the entirety of a regional air quality problem to comply with the Good Neighbor requirement; it must merely demonstrate it has taken action to prevent sources within its boundaries from contributing to such problems. See 42 U.S.C. 7410(a)(2)(D)(i)(I). The possibility that a State's assessment of its contribution might diverge from subsequent federal findings does not excuse a State from making an effort on its own. If a State has done something, but not enough, it will at least have partly addressed the statutory requirement to address interstate air pollution. See 42 U.S.C. 7410(k)(3) (EPA's authority to approve a SIP submission in part).[18]

States have ample information and means, even absent an EPA rule, to (1) determine the emissions

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[18] Where an already approved SIP is found not to fully comply with the Act, EPA can call for plan revisions under 42 U.S.C. 7410(k)(5), providing States with guidance and time for proposing alternatives, as it did in the NO_x SIP Call, see *supra*, 11-12, and in this rule for Kansas, see *infra*, 58 n.25.

from their own sources, (2) to assess the downwind impacts of those emissions; (3) identify neighbors with nonattainment problems, and (4) to reduce emissions that significantly contribute to their neighbors' nonattainment problems, or interfere with their ability to maintain attainment. Congress has repeatedly required similar technical analysis of States. See, *e.g.*, 42 U.S.C.7410(a)(1)(K); *id.* 7511a(c)(2)(A); *id.* 7511a(j) (specifically requiring States in multi-State ozone nonattainment areas to use air quality modeling); *id.* 7513a(a)(1); *id.* 7513a(b)(1). Indeed, in prior litigation, many petitioning States argued vigorously for their *right* to prepare Good Neighbor SIPs prior to EPA's quantification of interstate obligations. See State Pet. Br., *Michigan v. EPA*, D.C. Cir. 98-1497, at 37 ("EPA's role is to determine whether the SIP submitted is 'adequate' ... not to dictate contents of the submittal in the first instance. Under *Virginia* and *Train*, each State has the right and the obligation to write a SIP that complies with §[74]10(a)(2), including the 'good neighbor' provision in §[74]10(a)(2)(D).").[19]

States, including petitioners here, regularly conduct analyses using the same technology EPA used to develop the Transport Rule,[20] and such

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[19] EPA's *discretion* to issue a quantification rule, as it did in the NO_x SIP Call, does not authorize a court to *require* the agency to do so—and certainly not when such a requirement would conflict with statutory text.

[20] See, *e.g.*, Texas Commission on Environmental Quality, San Antonio Early Action Compact Ozone State Implementation Plan Revision at 3.1-3.2 (Nov. 17, 2004),

analyses incorporate assessment of interstate air pollution.[21] Two decades worth of regional air quality modeling developed for the purpose of meeting past interstate transport, regional haze, and prevention of significant deterioration requirements are available to the States.[22] And air quality data for each NAAQS pollutant are freely and publicly available on a monitor-by-monitor basis for each county in the country.[23]

Docket No. EPA-R06-OAR-2005-TX-0010-0020 (describing use of CAMx model to demonstrate ozone attainment expected by 2007) (hereinafter "San Antonio SIP") (SIP approved by EPA, 70 Fed. Reg. 48,877 (Aug. 22, 2005)).

[21] San Antonio SIP at 3.1-3.2 (noting modeling extends "throughout much of the South and Central U.S. including the Ohio River Valley to the north and Atlanta to the east" and that "[t]his regional scale grid matches the TCEQ standard modeling domain.").

[22] See, *e.g.*, EPA, Technical Support Document for the Final Clean Air Interstate Rule, Air Quality Modeling (March 2005), Docket No. EPA-HQ-OAR-2003-0053-2123, available at http://www.epa.gov/cair/technical.html; Lake Michigan Air Directors Consortium, Regional Air Quality Analyses for Ozone, $PM_{2.5}$, and Regional Haze: Final Technical Support Document, States of Illinois, Indiana, Michigan, Ohio, and Wisconsin (April 25, 2008), available at http://www.ladco.org/reports/technical_support_document/tsd/tsd_version_iv_april_25_2008_final.pdf. Regional air quality modeling information is available for all 48 continental States. See EPA, *Technology Transfer Network Support Center for Regulatory Atmospheric Modeling* (2013), http://www.epa.gov/ttn/scram/relatedindex.htm.

[23] See EPA, *Technology Transfer Network (TTN) Air Quality System (AQS)* (2013), http://www.epa.gov/ttn/airs/airsaqs/.

State capacity to meet Good Neighbor obligations is demonstrated by the experience of multiple States. For instance, Delaware, initially identified as a contributor to nonattainment in the proposed Transport Rule, demonstrated its compliance with Good Neighbor requirements by providing technical evidence demonstrating benefits of its own state regulations. 76 Fed. Reg. 53,638. 53,638-39 (Aug. 29, 2011) (approving Delaware SIP); 76 Fed. Reg. 2853, 2856 (Jan. 18 2011) (describing state efforts). EPA also approved Wyoming's Good Neighbor SIP, which used CAIR modeling, geographic and climatological data, and its own analysis to demonstrate that it did not contribute significantly to nonattainment in any other State. 73 Fed. Reg. 26,019, 26,022-23 (May 8, 2008).[24]

States need not hit "impossible-to-know target[s]," Pet.App. at 51a., in order to comply with the Good Neighbor provisions. They must, however, take action to prevent emissions sources within their boundaries from causing nonattainment and maintenance problems in downwind states. States' own experience demonstrates this is possible.

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[24] See also 77 Fed. Reg. 1027 (Jan. 9, 2012) (Colorado); 76 Fed. Reg. 48,002 (Aug. 8, 2011) (California). States' actual compliance with Good Neighbor obligations also rebuts any notion that the Act's plain meaning is "absurd." See Pet.App. 55a n.32. There is nothing absurd about the Act's assignment to States of initial responsibility for preparing plans to attain NAAQS. See also *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 459 (2002) (noting "the Court rarely invokes [absurd results] to override unambiguous legislation").

B. Having Issued Disapprovals and Nonsubmittal Findings Addressing Each State's Good Neighbor Implementation, EPA Had a Duty Under Section 7410(c)(1) to Promulgate Federal Implementation Plans Within Two Years

Notwithstanding the availability of information, technical capacity, and opportunity, States have failed to meet their Good Neighbor obligations. State responsibility with respect to two of the NAAQS at issue was first triggered over a decade ago, and nearly eight years have passed since EPA first formally declared the States' failure to comply with those requirements. After the D.C. Circuit held unlawful both CAIR and its related FIPs, and after EPA promulgated nonsubmittal findings and disapproved submitted plans that failed to satisfy statutory provisions, EPA faced a statutory and a judicial mandate to ensure that upwind States had in place plans to meet their Good Neighbor obligations.

1. No State Had Complied with the Act's Good Neighbor Requirement

As described above, *supra*, 12-14 & n.5, EPA issued disapprovals and nonsubmittal findings concluding that no Transport Rule State had submitted a State implementation plan satisfying the Good Neighbor requirements for either the 1997 $PM_{2.5}$ or ozone NAAQS. Under *North Carolina*, neither the CAIR FIP, nor CAIR-based SIPs, not at issue here, satisfied the statutory requirements to ensure no significant contribution to nonattainment

or interference with maintenance of downwind air quality standards. See *North Carolina*, 531 F.3d at 930; Pet.App. 172a-173a. As a result, EPA's Section 7410(c) obligation to ensure compliance with Section 7410(a)(2)(D)(i) requirements for 1997 ozone and $PM_{2.5}$ NAAQS remained in effect.[25] For the 2006 $PM_{2.5}$ NAAQS, many States had failed entirely to submit Good Neighbor SIPs, as EPA found formally, 75 Fed. Reg. at 32,673, while EPA disapproved other SIPs reliant on CAIR and thus not compliant with state obligations.[26]

Section 7410(c)(1) prescribes a two-year deadline for EPA promulgation of a FIP. Moreover, EPA recognized that *North Carolina* had left it with "an obligation to align the compliance dates with the

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[25] In 2007, EPA did approve a Good Neighbor SIP from Kansas based on a demonstration that the State did not significantly contribute to or interfere with maintenance of the 1997 ozone or $PM_{2.5}$ NAAQS in any other State. 72 Fed. Reg. 10,608, 10,609 (Mar. 9, 2007). Subsequent modeling indicated that Kansas has significant impacts on downwind State air quality for ozone. Because the agency had approved a SIP that remained lawful, but inadequate in light of post-approval developments, it concluded it did not have authority for action under Section 7410(c) and instead proposed to issue a SIP call under Section 7410(k)(5). 76 Fed. Reg. 80,760, 80,766 (Dec. 27, 2011).

[26] Pet.App. 173a. EPA also disapproved 2006 $PM_{2.5}$ Good Neighbor SIPs from New Jersey, New York, and Kansas because their submissions failed to provide adequate technical demonstration that their proposed emissions controls would address the downwind impacts of their emissions. 76 Fed. Reg. 43,153, 43,154 (July 20, 2011) (New Jersey, New York); 76 Fed. Reg. 43,143, 43,147-48 (July 20, 2011) (Kansas).

attainment deadlines for the relevant NAAQS." Primary RTC 73. EPA could not "leave CAIR in effect indefinitely. It has an obligation pursuant to the D.C. Circuit opinions in the *North Carolina* case, to issue a rule to replace the CAIR." *Id.* at 124.

2. The Majority's Conclusion that EPA Was Prohibited from Promulgating Federal Implementation Plans Contravenes the Plain Statutory Text

The panel concluded EPA erred by promulgating a FIP under Section 7410(c) containing control measures without having first issued a separate rule quantifying or defining States' Good Neighbor obligations. The statute's plain meaning either precludes the court's reading, *Chevron*, 467 U.S. at 842-43, or EPA's reading is a "reasonable" interpretation that warranted the panel's deference, *id.* at 845.

"The Administrator *shall* promulgate a Federal implementation plan at any time within 2 years after the Administrator" makes any of three specified triggering findings. 42 U.S.C. 7410(c)(1) (emphasis added). By statutory definition, a FIP "includes enforceable emission limitations or other control measures, means or techniques." 42 U.S.C. 7602(y). An "emission limitation," in turn, means, *inter alia*, "a requirement established by the State *or the Administrator* which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." *Id.* 7602(k) (emphasis added).

As to each of the FIPs at issue here, EPA made a Section 7410(c)(1) triggering finding: the agency in each instance either "disapprove[d] a State implementation plan submission in whole or in part," *id.* 7410(c)(1)(B), or found that the State "ha[d] failed to make a required submission," *id.* 7410(c)(1)(A). Accordingly, Section 7410(c)(1)'s requirement that EPA "shall" promulgate a federal implementation plan was triggered. See, *e.g.*, *Lopez*, 531 U.S. at 241. Moreover, the lone statutory off-ramp from EPA's FIP duty—agency approval of a submitted SIP that "corrects the deficiency," 42 U.S.C. 7410(c)(1)(B)—was inapplicable. There is no statutory exemption from EPA's FIP duty authorizing the approach posited by the panel—*i.e.*, delay of a FIP while EPA issues a rule quantifying or defining States' emissions obligations and allowing States additional time to submit SIPs. The court of appeals lacked authority to rewrite the statute by creating an exemption from EPA's FIP duty that Congress chose not to include. See *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 256 (2004) (statutory language was "categorical," and it was "impossible to find in it an exception" of the kind urged); *San Remo Hotel v. City and County of San Francisco*, 545 U.S. 323, 344 (2005) (rejecting the notion "that courts may simply create exceptions" to statute "wherever courts deem them appropriate").

The panel repeatedly suggested (Pet.App. 8a, 19a, 56a) that EPA should have proceeded under Section 7410(k)(5), which applies when EPA finds that "the applicable implementation plan for any

area" is substantially inadequate to comply with CAA requirements. As a threshold matter, for the NAAQS at issue here, EPA's authority is grounded in Section 7410(k)(1) through Section 7410(k)(3), which grant authority to disapprove State plans or make findings of non-submittal, and not in Section 7410(k)(5), which provides authority only to call for revisions of plans that have already been approved. See, *e.g.*, 70 Fed. Reg. at 21,148; 75 Fed. Reg. at 32,673.[27] Because section 7410(k)(5) addresses inadequacies in "the applicable implementation plan," it is inapplicable where there is no such plan because EPA has disapproved the State's submission or because the State did not make such a submission. See 42 U.S.C. 7602(q) (defining "applicable implementation plan" to include *inter alia* the portion of the implementation plan which "has been approved under section 7410 of this title"). No State subject to a FIP under the Transport Rule had an "applicable implementation plan" meeting its Good Neighbor obligations.[28]

Finally, the panel pointed to a separate CAA provision authorizing EPA to set "emission

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[27] The only instance where EPA had authority to invoke Section 7410(k)(5) in the Transport Rule is as to Kansas. See *supra*, 58 n.25. The panel mistakenly characterized EPA's action as to Kansas, suggesting that EPA had invoked FIP authority. Pet.App. 14a-15a (describing supplemental transport rule as adding 6, not 5, States to Transport Rule's ozone program).

[28] See *supra*, 57-58. This contrasts with the NO_x SIP Call. See *infra*, 66-67.

limitations and compliance schedules" for sources emitting interstate pollution, 42 U.S.C. 7426(c), reasoning by negative implication that EPA lacked such authority here. Pet.App. 55a. But Section 7410(c)(1) expressly authorizes a "federal implementation plan," which in turn includes "emission limitations." 42 U.S.C. 7602(y). Moreover, the provisions in Section 7426 relate to interstate pollution caused by a specific "major source" or "group of stationary sources," 42 U.S.C. 7426(b), whereas Section 7410(a)(2)(D)(i) refers to "any source or other type of emissions activity." To the degree these sections overlap, this is nothing exceptional, see *Babbitt v. Sweet Home Chapter*, 515 U.S. 687, 703 (1995). Section 7426 (added in 1977) does not expressly override Section 7410(c) (added in 1970), and basic statutory interpretation principles preclude inferring such an override. See, *e.g.*, *J.E.M. Ag. Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124, 137, 141-42 (2001) (repeal by implication requires "overwhelming evidence" and will be found only "when the earlier and later statutes are irreconcilable").

3. The Rule's Federal Implementation Plans Fit Squarely Within the Act's Cooperative Federalism Approach

The panel invoked federalism principles in an attempt to justify its insertion of a judge-made additional step into the statutory FIP process. But, because Congress unquestionably has power to

regulate interstate air pollution,[29] the question before the panel was simply one of statutory interpretation. *Cf. Egelhoff v. Egelhoff*, 532 U.S. 141, 151 n.4 (2001) ("Contrary to the dissent's suggestion that the resolution of this case depends on one's view of federalism, we are called upon merely to interpret ERISA") (citation omitted). As shown above, the statute precludes the panel's approach.

The panel relied on a "federalism bar" that it drew from *Train*, 421 U.S. at 60, and *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir. 1997), *modified*, 116 F.3d 499 (D.C. Cir. 1997). While both decisions reflect a State's primary role in determining controls within a state implementation plan, neither involved *federal* implementation plans under 42 U.S.C. 7410(c). Both expressly recognized EPA's authority to promulgate FIPs. *Train*, 421 U.S. at 79 (citing Section 7410(c), recognizing that EPA could "devise and promulgate a specific plan of its own" if "a State fails to submit an implementation plan which satisfies th[e] standards" of Section 7410(a)(2)); *Virginia*, 108 F.3d at 1408 ("if EPA rejected a State Plan because it would not achieve or maintain ambient air quality standards, EPA could promulgate a federal implementation plan").

Far from raising a federalism problem, the Act's implementation plan provisions foster the

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[29] See, *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 519 (2007); *Hodel v. Virginia Surface Mining & Recl. Ass'n*, 452 U.S. 264, 282 (1981).

federalism interests reflected in *Train*. The statute provides States the opportunity to first submit State plans sufficient to attain NAAQS within their borders and downwind. 42 U.S.C. 7410(a)(1), 7410(a)(2). Only when—as here—EPA has found States have failed to submit a plan that satisfies those requirements is the agency's FIP duty triggered. *Id.* 7410(c)(1). States can supplant a FIP by submitting a compliant Good Neighbor SIP. *Id*; *id.* 7410(k)(1),(3); *id.* 7410(l).[30] These provisions embody the "cooperative federalism" paradigm approved by this Court, which has recognized Congress' power to "offer States the choice of regulating ... activity according to federal standards or having State law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992) (internal quotations and citation omitted).

It is the panel's approach, not EPA's, that disserves cooperative federalism. The decision below would actually *reduce* the State authority it purports to foster—as is confirmed by contrasting the panel's ruling with the positions taken by a number of the petitioning States noted in *Michigan*. See *supra*, 54. While the statute's plain meaning

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[30] These multiple opportunities for State regulation of both intrastate and interstate emissions implement the Act's purpose clause recognizing States' role in air pollution abatement. 42 U.S.C. 7410(a)(3) (cited by court of appeals majority at Pet.App. 33a). In any event, Section 7410(a)(3)'s statement of purpose cannot override the unambiguous text of substantive statutory provisions such as 42 U.S.C. 7410(c)(1). *Cf. New York v. FERC*, 535 U.S. 1, 22 (2002) .

gives States the initial opportunity to implement the Act's Good Neighbor obligation, the panel's interpretation would transfer that prerogative to EPA. See, *e.g.*, Pet.App. 8a ("*EPA* plays the critical role in gathering information about air quality in the downwind States, calculating each upwind State's Good Neighbor obligation, and transmitting that information to the upwind State.") (emphasis added). Neither the statute nor the two precedents cited by the panel (*Train* and *Virginia*) authorize a court to abrogate explicit state responsibilities under section 7410(a), nor to establish judicially-created EPA obligations as prerequisites to state duties. See *Train*, 421 U.S. at 79 (recognizing States' responsibility to submit SIPs complying with section 7410(a)(2)). Accord *Union Electric*, 427 U.S. at 256-57.

The panel's shift of authority away from States to EPA thus contravenes the panel's own recognition that "Congress intended *States* to implement the obligations set forth in Section 110(a)(2)(D)(i)(I)." Pet.App. 54a (emphasis in original).

4. Prior EPA Interstate Transport Decisions Do Not Support the Panel Majority's Reading

The panel sought support for its approach in two prior EPA interstate air pollution rules. Pet.App. 55a-57a. Because the Act's plain meaning must be implemented by both courts and agencies, see *Chevron*, 467 U.S. at 842-43, prior agency practice cannot justify the panel's exercise in judicial

rewriting. And even if there were some ambiguity in the statute, an agency's decision to calibrate its approach is permissible, where (as here) the adjusted approach reasonably implements the statute. See *id.* at 863-64.

Neither the NO_x SIP Call nor CAIR supports the panel's position that States are not obligated to submit Good Neighbor plans until EPA has promulgated a rule quantifying or defining each State's Good Neighbor obligation. Pet.App. 8a-9a, 47a-48a. In CAIR, EPA issued its nonsubmittal findings for the 1997 NAAQS on April 25, 2005, 70 Fed. Reg. at 21,147, *prior* to finalizing its quantification of interstate obligations on May 12, 2005, 70 Fed. Reg. at 25,162. The panel opinion focused on the fact that EPA did not issue a FIP until a year after finalizing significant contribution amounts in CAIR, 71 Fed. Reg. 25,304 (Apr. 28 2006). But under the panel's theory, the States' obligation to submit a Good Neighbor SIP did not even arise until quantified in CAIR, three weeks *after* EPA had determined the States had failed to meet these obligations.

The NO_x SIP Call involved a distinct factual situation, where EPA requested revision to *previously approved* Good Neighbor SIPs based on information developed in the Ozone Transport Assessment Group process and related analysis. 62 Fed. Reg. 60,318, 60,320 (Nov. 7, 1997). EPA's prior approval of Good Neighbor SIPs laid a predicate for the agency to invoke Section 7410(k)(5), 63 Fed. Reg. at 57,367, and the availability of newfound

information generated as a result of efforts to address ozone challenges in the northeast created a duty to do so. 62 Fed. Reg. at 60,369.[31] In the NO_x SIP Call, EPA recognized, and used, *authority* under section 7601(a) to issue a rule prospectively quantifying States' Good Neighbor obligations, see 42 U.S.C. 7601(a)(1) (the Administrator is "authorized" to prescribe regulations), and the D.C. Circuit upheld that authority. *Michigan*, 213 F.3d at 687. But EPA's *discretion* to issue a quantification rule does not authorize a court to *require* the agency to do so—and certainly not when such a requirement conflicts with statutory text.

The circumstances of the Transport Rule's adoption differ markedly from both prior rulemakings. EPA's time-limited FIP duty had been triggered for a host of eastern States. The D.C. Circuit had invalidated EPA's prior rule—CAIR—and commanded the agency to replace CAIR expeditiously in order to ensure that emissions reductions would occur soon enough to allow downwind States to meet their statutory NAAQS attainment deadlines. *North Carolina*, 531 F.3d at 908-12; 550 F.3d at 1178. Thus, not only did EPA

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[31] EPA explained this distinct situation in the preamble to CAIR: "at the time of the NO_x SIP Call in 1998 ... EPA issued a section 110(k)(5) SIP call to States regarding their section 110(a)(2)(D) obligations on the basis of new information that was developed years after the States' SIPs had been previously approved as satisfying section 110(a)(2)(D) without providing for additional controls." 70 Fed. Reg. at 25,264.

confront long-expired statutory deadlines for Good Neighbor SIPs, but it was also under pointedly worded judicial instructions. The notion that EPA was *obligated* to defer action in these circumstances is untenable.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 2013

PETITIONER'S BRIEF

RECORD
AND
BRIEFS

Nos. 12-1182 and 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The Clean Air Act (Act), 42 U.S.C. 7401 *et seq.*, requires the Environmental Protection Agency (EPA) to establish national ambient air quality standards (air quality standards or standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation" of a standard, each State must adopt a state implementation plan (state plan) with "adequate provisions" that will, inter alia, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the air quality standard. 42 U.S.C. 7410(a)(1) and (2)(D)(i)(I). If a State fails to submit a state plan or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1).

The questions presented are as follows:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

2. Whether States are excused from adopting state plans prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDINGS

Petitioners in 12-1182 are the United States Environmental Protection Agency (EPA) and EPA Administrator Gina McCarthy. Petitioners in 12-1183 are the American Lung Association, the Clean Air Council, the Environmental Defense Fund, the Natural Resources Defense Council, and the Sierra Club.

Respondents who were petitioners in the court of appeals are: City of Ames, Iowa; City of Springfield, Illinois, Office of Public Utilities, doing business as City Water, Light & Power; Louisiana Department of Environmental Quality; Louisiana Public Service Commission; Mississippi Public Service Commission; Public Utility Commission of Texas; Railroad Commission of Texas; State of Alabama; State of Florida; State of Georgia; State of Indiana; State of Kansas; State of Louisiana; State of Michigan; State of Nebraska; State of Ohio; State of Oklahoma; State of South Carolina; State of Texas; Commonwealth of Virginia; State of Wisconsin; Texas Commission on Environmental Quality; Texas General Land Office; AEP Texas North Co; Alabama Power Co.; American Coal Co.; American Energy Corp.; Appalachian Power Co.; ARIPPA; Big Brown Lignite Company LLC; Big Brown Power Company LLC; Columbus Southern Power Co.; Consolidated Edison Company of New York, Inc.; CPI USA North Carolina LLC; Dairyland Power Cooperative; DTE Stoneman, LLC; East Kentucky Power Cooperative, Inc.; EME Homer City Generation, LP.; Entergy Corp.; Environmental Committee of the Florida Electric Power Coordinating Group, Inc.; Environmental Energy Alliance of New York, LLC; GenOn Energy, Inc.; Georgia Power Co.; Gulf Power Co.; Indiana Michigan Power Co.; International Brotherhood of Electrical Workers, AFL-CIO; Kansas City Board of Public Utilities, Uni-

fied Government of Wyandotte County, Kansas City, Kansas; Kansas Gas and Electric Co.; Kenamerican Resources, Inc.; Kentucky Power Co.; Lafayette Utilities System; Louisiana Chemical Association; Luminant Big Brown Mining Company LLC; Luminant Energy Company LLC; Luminant Generation Company LLC; Luminant Holding Company LLC; Luminant Mining Company LLC; Midwest Food Processors Association; Midwest Ozone Group; Mississippi Power Co.; Municipal Electric Authority of Georgia; Murray Energy Corp.; National Mining Association; National Rural Electric Cooperative Association; Northern States Power Co. (a Minnesota corporation); Oak Grove Management Company LLC; Ohio Power Co.; Ohio Valley Coal Co.; Ohio American Energy, Inc.; Peabody Energy Corp.; Public Service Company of Oklahoma; Sandow Power Company LLC; South Mississippi Electric Power Ass'n; Southern Company Services, Inc.; Southern Power Co.; Southwestern Electric Power Co.; Southwestern Public Service Co.; Sunbury Generation LP; Sunflower Electric Power Corp.; Utility Air Regulatory Group; United Mine Workers of America; Utah American Energy, Inc.; Westar Energy, Inc.; Western Farmers Electric Cooperative; Wisconsin Cast Metals Association; Wisconsin Electric Power Co.; Wisconsin Paper Council, Inc.; Wisconsin Manufacturers and Commerce; Wisconsin Public Service Corp.

Respondents who were intervenors in support of the court of appeals petitioners are: San Miguel Electric Cooperative; City of New York (Nos. 11-1388 and 11-1395 only); State of New York (Nos. 11-1388 and 11-1395 only).

Respondents who were intervenors in support of the court of appeals respondents are: American Lung Association; Calpine Corporation; Clean Air Council; Envi-

ronmental Defense Fund; Exelon Corporation; Natural Resources Defense Council; Public Service Enterprise Group, Inc.; Sierra Club; City of Bridgeport, Connecticut; City of Chicago; City of New York (all but Nos. 11-1388 and 11-1395); City of Philadelphia; Mayor and City Council of Baltimore; State of Connecticut; State of Delaware; District of Columbia; State of Illinois; State of Maryland; Commonwealth of Massachusetts; State of New York (all but Nos. 11-1388 and 11-1395); State of North Carolina; State of Rhode Island; State of Vermont.

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In the Supreme Court of the United States

No. 12-1182

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

No. 12-1183

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7. The final rule of the Environmental Protection Agency (Pet. App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (Pet. App. 1459a-1462a). The petitions for writs of certiorari were filed on March 29, 2013, and

granted (and consolidated) on June 24, 2013. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set out in an appendix to this brief. App., *infra*, 1a-35a.

STATEMENT

1. a. Air pollution emitted in one State but causing serious harm in others has long been an issue of national concern. The fundamental problem is that the emitting, or upwind, State secures all the benefits of the economic activity causing the pollution without having to absorb all the costs. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996). Conversely, many downwind States to which interstate pollution travels find it impossible to achieve clean air because of the influx of out-of-state pollution they cannot control. S. Rep. No. 228, 101st Cong., 1st Sess. 49 (1989) (1989 Senate Report) (noting that New York, New Jersey, and Connecticut would be unable to meet the federal standard for ozone even if they eliminated *all* in-state emission sources).

This Court first addressed the question of interstate air pollution more than a century ago when it concluded that an injunction should be issued against two copper smelters in Tennessee "discharging noxious gas" that had visited "wholesale destruction of forests, orchards and crops" in Georgia. *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230, 236 (1907) (Holmes, J.). The Court explained that "[i]t is a fair and reasonable demand on the part of a sovereign" in our federal system "that the air over its territory should not be polluted on a great scale * * * by the act of persons beyond its control" in another State. *Id.* at 238; see *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2535-2536 (2011) (dis-

cussing other decisions that "have approved federal common law suits brought by one State to abate pollution emanating from another State").

b. Beginning 50 years ago, Congress has also sought to mitigate interstate pollution by enacting a series of increasingly aggressive amendments to the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*

i. In 1963, Congress directed federal environmental officials to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution," 42 U.S.C. 1857a (1964); see Act of Dec. 17, 1963, Pub. L. No. 88-206, 77 Stat. 392, and established a complex mechanism for the abatement of interstate air pollution, 42 U.S.C. 1857d(c)-(g) (1964).

ii. In 1970, Congress amended the Act to add generally applicable structural elements that remain today. Since 1970, the Act has required the Environmental Protection Agency (EPA) to establish national ambient air quality standards (NAAQS or air quality standards) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. The Act also directs States to submit to the EPA state implementation plans (SIPs or state plans) to meet those standards, and it requires federal implementation plans (FIPs or federal plans) if States submit inadequate plans or fail to submit altogether. 42 U.S.C. 7410(a) and (c)(1). These amendments reflected Congress's effort to "sharply increase[] federal authority and responsibility in the continuing effort to combat air pollution." *Train* v. *NRDC*, 421 U.S. 60, 64 (1975).

Because the 1963 mechanism for abatement of interstate air pollution had "proved to be cumbersome, time consuming, and unwieldy," H.R. Rep. No. 294, 95th Cong., 1st Sess. 329 (1977) (1977 House Report), Con-

gress in 1970 used the new state-plan process to address the issue. In particular, Congress required state plans to include "adequate provisions for intergovernmental cooperation" on interstate air pollution. 42 U.S.C. 1857c-5(a)(2)(E) (1970). The EPA, however, interpreted this provision to require "mere exchange of information" between upwind and downwind States rather than "binding enforcement agreements." *NRDC* v. *EPA*, 483 F.2d 690, 692 (8th Cir. 1973). As a result, no enforcement actions took place under this provision, and "serious inequities among several States" persisted. S. Rep. No. 127, 95th Cong., 1st Sess. 41 (1977) (1977 Senate Report).

iii. Concluding that the 1970 provision was "an inadequate answer to the problem of interstate air pollution," Congress amended the Act in 1977 in another attempt "to establish an effective mechanism for prevention, control, and abatement of interstate air pollution." 1977 House Report 330. Congress's goal was to "mak[e] a source at least as responsible for polluting another State as it would be for polluting its own State." 1977 Senate Report 42. To accomplish that objective, Congress required that all state plans include "adequate" provisions "prohibiting any stationary source within the State from emitting any air pollutant in amounts which will * * * prevent attainment or maintenance [of air quality standards] for any other State." 42 U.S.C. 7410(a)(2)(E) (Supp. II 1977). This requirement has come to be known as the "good neighbor" provision.

The original good neighbor provision proved to be inadequate. In particular, it applied only to interstate emissions from a "single source," rendering it ineffective "in prohibiting emissions from * * * multiple sources, mobile sources, and area sources." 1989 Senate Report

21. In addition, emissions violated the Act only if they "*prevent[ed]* attainment" in a downwind State, yet it typically proved "impossible to say that any single source or group of sources is the one which actually prevents attainment." *Ibid.* (emphasis added).

iv. In 1990, Congress addressed the problem again, this time extending the good neighbor provision beyond a single stationary source and "eliminat[ing] the need to establish a causal relationship between a polluter and violation of an ambient standard." 1989 Senate Report 75; see Pet. App. 25a n.14. The good neighbor provision now requires state plans to "contain adequate provisions * * * prohibiting * * * any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interference with maintenance by, any other State with respect to any [air quality standard]." 42 U.S.C. 7410(a)(2)(D)(i)(I).

2. Following the 1990 amendments, the EPA began a series of rulemakings to address the revised good neighbor provision.

a. In each of these rulemakings, the EPA confronted a problem of considerable technical complexity. In particular, air quality modeling shows that ozone[1] and fine particles ($PM_{2.5}$)[2] pollution problems are caused by the

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[1] Short-term exposure to ozone at sufficient concentrations "can irritate the respiratory system" and aggravate asthma, and it has been associated with premature mortality. Pet. App. 166a-167a. "Longer-term ozone exposure can inflame and damage the lining of the lungs, which may lead to permanent changes in lung tissue and irreversible reductions in lung function." *Id.* at 167a; see *ibid.* (discussing impacts on environment and agriculture).

[2] Fine particles "are associated with a number of serious health effects including premature mortality, aggravation of respiratory and cardiovascular disease[,] * * * lung disease, * * * asthma attacks,

collective contribution of nitrogen oxide (NO_x) and sulfur dioxide (SO_2) emissions from numerous upwind States to particular downwind areas, combined with local emissions from the affected downwind areas themselves.[3]

Further complicating matters is the fact that many States that are upwind contributors to pollution problems in other States also receive upwind emissions that contribute to their own air pollution problems (*i.e.*, they are both upwind and downwind), and most upwind States contribute, in varying degrees, to pollution problems in many downwind areas. The interstate pollution problem is thus best understood as a dense, spaghetti-like matrix of overlapping upwind/downwind "linkages" among many States, rather than a neater and more limited set of linkages among just a few.

The EPA's modeling for this rule evaluated 2479 potential contribution linkages among 37 upwind States and 67 ozone and $PM_{2.5}$ downwind nonattainment and maintenance receptors, *i.e.*, locations where air quality

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and certain cardiovascular problems." Pet App. 165a; see *id.* at 165a-166a (discussing impacts on environment and agriculture).

[3] The underlying chemical mechanisms are complex but can be summarized in general terms as follows. In the case of ozone pollution, emissions of NO_x and volatile organic compounds (VOCs) mix in the atmosphere in the presence of sunlight to form ozone. Given the nature of VOCs emissions, the interstate component of ozone pollution is due primarily to NO_x emissions that can be transported in the atmosphere over hundreds of miles. Pet. App. 185a-187a. $PM_{2.5}$ can be emitted directly or formed secondarily in the atmosphere. The interstate component of $PM_{2.5}$ pollution is primarily attributable to the formation of sulfates from SO_2 emissions from power plants and industrial facilities and nitrates from NO_x emissions from power plants, automobiles, and other combustion sources. These precursors, as well as the fine particles themselves, can be transported long distances in the atmosphere. 69 Fed. Reg. 4566, 4575 (Jan. 30, 2004).

is measured and that are at risk of not attaining or maintaining air quality standards. Of those linkages, 565 were above the one-percent threshold used by the rule's screening analysis to subject them to further review. For each of the downwind nonattainment and maintenance receptors, between 17 and 36 upwind States contributed to the downwind problem, with between five and 12 (and a mean of eight) making contributions substantial enough to exceed the screening threshold. For ozone, four out of 25 contributing States were both upwind contributors and downwind receptors, while for $PM_{2.5}$, this figure was nine out of 23.[4]

The modeling EPA used in this case also starkly illustrates the challenge that interstate pollution transport poses to downwind States. For the receptors identified in this rule as having ozone problems, the out-of-state share of pollution contributions ranges from a low of 35% to a high of 93%. J.A. 177-178. For those receptors in areas with $PM_{2.5}$ problems, the range is 47% to 89%, with all but one area above 50%. J.A. 179-184.

New Haven, Connecticut, which has difficulty maintaining the ozone standard, provides one specific downwind example. Out-of-state contributions are responsible for 93% of ozone pollution in New Haven. J.A. 178. Twenty-eight of 36 States studied in the EPA's modeling contribute at least 0.1 parts-per-billion (ppb) to New Haven's ozone problem. C.A. App. 2704-2705. Ten of the upwind contributions exceed the rule's screening threshold. *Ibid.* Not only does the total out-of-state contribution (59.6 ppb) dwarf Connecticut's own contribution (4.4 ppb), J.A. 178, but four upwind States also

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[4] The figures discussed in this paragraph are derived from data in an EPA technical support document that accompanied the Transport Rule. See C.A. App. 2700-2727; J.A. 175-185.

contribute more *on their own* to ozone pollution in New Haven than Connecticut itself does, C.A. App. 2704-2705.

b. The EPA's first rule implementing the 1990 good neighbor provision was the "NO_x SIP Call," which in 1998 regulated NO_x emissions to address interstate contributions to nonattainment in downwind States of the air quality standard for ozone. 63 Fed. Reg. 57,356 (Oct. 27, 1998). The D.C. Circuit upheld the NO_x SIP Call in relevant respects. *Michigan* v. *EPA*, 213 F.3d 663, 682 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001).

c. In 2005, the EPA issued the Clean Air Interstate Rule (CAIR), which addressed emissions of NO_x and SO_2 contributing to nonattainment of the air quality standard for $PM_{2.5}$ and of a new, more stringent standard for ozone. 70 Fed. Reg. 25,171 (May 12, 2005). The D.C. Circuit remanded CAIR, in part on the ground that it was insufficiently protective of downwind States. *North Carolina* v. *EPA*, 531 F.3d 896, 908-912 (2008); see *North Carolina* v. *EPA*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam).

3. This case involves the Cross-State Air Pollution Rule (commonly referred to as the Transport Rule). Pet. App. 117a-1458a. The Transport Rule responded to the remand in *North Carolina* and addressed the emission of pollutants in 27 upwind States that significantly contribute to downwind States' problems attaining or maintaining the air quality standards for ozone and $PM_{2.5}$.[5] In issuing the rule, the EPA cited a study show-

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[5] The Transport Rule addressed three distinct air-quality standards: (1) the 1997 annual $PM_{2.5}$ standard; (2) the 2006 daily $PM_{2.5}$ standard; and (3) the 1997 8-hour ozone standard. Pet. App. 168a. Because the differences in the EPA's analysis for the two $PM_{2.5}$

ing that "1 in 20 deaths in the U.S. is attributable to $PM_{2.5}$ and ozone exposure" and that there are "almost 200,000 non-fatal heart attacks, 90,000 hospital admissions due to respiratory or cardiovascular illness, 2.5 million cases of aggravated asthma among children, and many other human health impacts to exposure to these two air pollutants." *Id.* at 602a.

a. As noted above (pp. 3, 5, *supra*), the Act provides for each State to adopt a state plan that, *inter alia*, assures that the State will not emit pollutants in amounts that "contribute significantly" to other States' nonattainment of the air quality standards or inability to maintain compliance with them. 42 U.S.C. 7410(a)(2)(D)(i)(I). If the EPA finds that a State has failed to submit a plan or determines that a state plan does not meet these or other requirements of the Act, the EPA "shall" issue a federal plan for that State within two years of that finding. 42 U.S.C. 7410(c)(1).

For each State subject to the Transport Rule, the EPA had previously conducted a separate administrative proceeding in which the agency either (1) had made a finding that the State had failed to submit a state plan addressing the good neighbor requirement, or (2) had disapproved the State's plan as inadequate. Those administrative determinations triggered the statutory requirement for the EPA to promulgate a federal plan

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standards are largely irrelevant to the issues addressed in this case, this brief refers simply to the $PM_{2.5}$ standard except as specifically noted. In 2008, the 8-hour ozone standard was revised to be somewhat more stringent, *id.* at 169a; see *Mississippi* v. *EPA*, No. 08-1200, 2013 WL 3799741 (D.C. Cir. July 23, 2013), and on January 15, 2013, the EPA revised its suite of particulate matter standards, making the annual $PM_{2.5}$ standard more stringent but retaining the same standard for daily $PM_{2.5}$, 78 Fed. Reg. 3086. The Transport Rule does not address these revised standards.

within two years. 42 U.S.C. 7410(c)(1); see Pet. App. 171a-172a; C.A. App. 3168-3178. In the Transport Rule, the EPA therefore promulgated federal plans for those States.

The EPA's analysis proceeded sequentially. The EPA initially used air quality modeling to identify downwind areas that will likely have difficulty attaining or maintaining compliance with the relevant air quality standards. Pet. App. 137a, 198a-254a. The EPA then conducted a two-step analysis to determine the amount of each upwind State's significant contribution to those downwind problems. In the first step (the screening analysis), the EPA "used air quality modeling to determine which upwind [S]tates are projected to contribute at or above threshold levels to the air quality problems" in the areas with attainment and maintenance problems. *Id.* at 137a-138a. Any State whose contributions to a specific receptor in a downwind area exceeded a specified threshold (one percent of the relevant air quality standard) was "considered linked to that receptor." *Id.* at 255a; see *id.* at 256a-258a.

In the second step (the control analysis), the EPA confirmed the inclusion of the States identified in the previous step,[6] and then "quantifie[d] the portion of each [S]tate's contribution that constitutes its 'significant contribution' or 'interference with maintenance.'" Pet. App. 316a. To make those judgments, the EPA used "an analysis that accounts for both cost and air quality improvement to identify the portion of a [S]tate's contribution that constitutes its significant contribution." *Ibid.*

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[6] Although the District of Columbia (because it was modeled together with Maryland) had contributions above the screening threshold, it was left out of the Transport Rule as a result of the control analysis. Pet. App. 380a-381a.

In particular, for each upwind State, the EPA developed "cost curves" to quantify emission reductions that could be achieved at ascending levels of cost per ton. Pet. App. 319a, see *id.* at 323a-337a. The EPA then used an air-quality assessment tool to estimate how emission reductions at each of those cost thresholds (if adopted by both linked upwind States and the downwind receptor States) would affect air quality in each downwind area. *Id.* at 321a, 338a-349a; see C.A. App. 2945-2962.

The EPA next examined this cost and air quality information to identify "significant cost thresholds," *i.e.*, "point[s] where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective." Pet. App. 322a, see *id.* at 349a-366a. For example, analysis of the data showed "a cost threshold with rapidly diminishing returns at $500/ton" for ozone-season NO_x. *Id.* at 351a. In particular, the "EPA observed that moving beyond the $500 cost threshold up to a $2,500 cost threshold would result in only minimal additional ozone season NO_x emission reductions." *Ibid.* Conversely, a lower cost-threshold would create perverse incentives for emitters to stop using low-cost emission controls already in place. *Id.* at 354a. For SO_2, the EPA determined that all downwind nonattainment and maintenance problems were solved at a $500/ton threshold for one group of upwind States, so it adopted that threshold for them. *Id.* at 356a-357a. For another group of States, however, significant downwind problems remained at that threshold, so the EPA adopted a $2300/ton threshold, the point at which most non-attainment and maintenance problems were solved and beyond which there were "notably smaller air quality improvements." *Id.* at 357a-365a.

At the final stage, the EPA used the assembled information to create a state "budget" of permitted emissions. Pet. App. 323a, 366a-392a. It did so by modeling the quantity of pollutants that sources in each upwind State would emit if all emission reductions achievable at the specified cost threshold were implemented. *Id.* at 366a-367a. The difference between that level of emissions and the level that would occur without adoption of controls was the amount of the State's significant contribution. *Ibid.*

Instead of imposing traditional command-and-control mechanisms to enforce state emission budgets, the EPA utilized cap-and-trade programs. Pet. App. 424a-431a; see 63 Fed. Reg. at 57,378, 57,457. Under that approach, sources of the relevant pollutant within the State receive allowances authorizing emissions of the pollutant at a given level, with all allowances in the aggregate authorizing emissions only up to the State's budget (subject to some accommodation for emissions variability). Allowances are traded much like other commodities. Sources that can reduce emissions less expensively than others therefore may sell their unneeded allowances. Conversely, sources that cannot reduce emissions as cost-effectively as others may purchase additional allowances on the market. Such a system gives sources the flexibility to secure required emission reductions in the most feasible and least expensive manner, while still assuring that the overall pollution-control targets are met. See generally *Michigan*, 213 F.3d at 676; Pet. App. 424a-428a; *Clean Air Markets* (2010), http://www.epa.gov/airmarkets/progsregs/index.html (last visited Sept. 3, 2013).

b. In *Michigan*, the D.C. Circuit reviewed the NO_x SIP Call and upheld the EPA's analytical approach,

which, like the one at issue here, defined significant contribution partly in light of cost considerations. 213 F.3d at 677-680. The court held that the term "significant" (as used in the good neighbor provision) is ambiguous, and that the EPA may permissibly determine the amount of a State's "significant" contribution by reference to the amount of emission reductions achievable through application of "highly cost-effective controls." *Id.* at 677-680. The court observed that "[t]he term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, in the petitioners' view, health alone." *Id.* at 677.

The EPA used the same basic analytical approach for CAIR, and the D.C. Circuit in *North Carolina* expressly declined to disturb it. 531 F.3d at 916-917. The court of appeals ultimately remanded CAIR, however, principally because it determined that the rule provided insufficient assurance that each upwind State would, in fact, make the emission reductions necessary to address downwind nonattainment and maintenance problems. *Id.* at 907-908, 917-918; see *North Carolina*, 550 F.3d at 1178.

4. In the Transport Rule, the EPA again used the same basic approach that the D.C. Circuit had previously upheld, Pet. App. 136a-139a, but this time a divided panel of the court of appeals rejected it, *id.* at 1a-116a.[7]

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[7] To the extent that the EPA's two-step regulatory approach for the Transport Rule differed in any significant way from that used in the NO_x SIP Call and CAIR, it was to place *greater* emphasis on air-quality factors (and thus less emphasis on cost) in determining the required level of emission reductions. Pet. App. 421a. Most notable in this respect was the agency's decision to create two different cost thresholds for SO_2 controls to apply to different groups of States depending on the severity of the associated downwind $PM_{2.5}$ nonattainment problems. *Id.* at 314a, 316a-323a.

a. The panel majority discerned three statutory "red lines" in the good neighbor provision and concluded that the Transport Rule had transgressed them. Pet. App. 22a. First, the court found the rule violated the Act because it could theoretically require a State to reduce emissions below the threshold level the rule's screening analysis used to determine whether that State's emissions warranted further evaluation. *Id.* at 23a, 31a-38a. Second, the court believed that, where multiple upwind States contribute to a common downwind nonattainment problem, the rule did not guarantee that upwind States' emission-reduction obligations were proportional to their shares of modeled downwind contribution. *Id.* at 24a-27a, 38a-39a. Third, the court concluded that the rule did not assure that the collective obligations of upwind States would be no more than the minimum amount necessary to enable affected downwind areas to meet the air quality standards. *Id.* at 27a-29a, 39a-41a.[8]

b. The court of appeals also identified what it viewed as a "second, entirely independent problem with the Transport Rule." Pet. App. 42a. The court held that, once the EPA had "quantif[ied] each upwind State's good neighbor obligations," the agency was required to "giv[e] the States an initial opportunity to implement the obligations themselves through their State Implementation Plans." *Ibid.* The court held that the EPA had violated the Act by issuing federal plans as part of the Transport Rule itself, without "giv[ing] the States the first opportunity to implement" their good neighbor obligations. *Id.* at 42a-43a; see *id.* at 42a-61a.

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[8] The court of appeals stated that the EPA might have "discretion" to depart from these perceived statutory restrictions, but only to the extent it faced insurmountable technical obstacles in complying with them. Pet. App. 28a-29a.

Judge Rogers dissented. Pet. App. 65a-116a. She concluded that the court did not have jurisdiction to issue either of its alternative holdings. *Id.* at 65a-69a, 70a-82a, 95a-110a. On the merits, Judge Rogers would have held that the Transport Rule reflected a permissible construction of the Act. *Id.* at 83a-95a, 112a-114a.

SUMMARY OF ARGUMENT

The court of appeals erred both in determining that it had jurisdiction to consider the particular challenges that it ultimately found meritorious, and in rejecting the EPA's reasonable interpretations of the Act.

A. In holding that the EPA had issued federal implementation plans prematurely, the court of appeals exceeded its jurisdiction and misread the Act's requirements.

Before the EPA issued the Transport Rule, it took separate administrative actions in which it determined that (i) some States had breached their legal obligation to submit plans with good neighbor provisions for the relevant air quality standards, and (ii) other States had submitted inadequate plans. Those administrative actions logically and expressly depended upon the premise that States were required to timely submit plans containing good neighbor provisions whether or not the EPA had quantified particular States' good neighbor obligations. The large majority of those administrative actions went unchallenged, and the petitions for review challenging the remainder were not before the court in this case. The Act requires petitions for review challenging a particular EPA action to be filed within 60 days of *that* action, 42 U.S.C. 7607(b)(1), and the EPA is entitled to treat final actions for which the statutory review period has run as valid triggering events for subsequent, statutorily-mandated measures. The court

of appeals therefore exceeded its jurisdiction by holding, in direct contradiction to the EPA's prior determinations, that States have no duty to submit plans with good neighbor provisions until the EPA quantifies the relevant obligations.

On the merits, the court of appeals erred by effectively nullifying obligations the Act imposes on States, and by rejecting as premature the federal plans that the EPA was *required* to issue. Under the Act, States are required to submit state plans within three years of a new air quality standard, and such plans must include good neighbor provisions. 42 U.S.C. 7410(a)(1) and (2)(D)(i). The Act further requires the EPA to issue a federal plan if it finds that a State has not adequately complied with those requirements. 42 U.S.C. 7410(c) and (k). Nowhere did Congress make a State's duty to submit a plan contingent upon the EPA's prior quantification of the State's good neighbor obligations. In fact, the Act does not require the agency to conduct such quantification *at all*.

B. In invalidating the Transport Rule on statutory grounds that were not preserved during agency proceedings, the court of appeals exceeded its jurisdiction and misconstrued the Act's good neighbor provision.

The Act requires that objections be raised "with reasonable specificity" in the EPA proceedings before they can be adjudicated in court. 42 U.S.C. 7607(d)(7)(B). That provision helps ensure reasoned agency decisionmaking and adequately-informed judicial review, especially in an area (like this one) of technical complexity. The court of appeals violated this limit on its jurisdiction when it invalidated the Transport Rule for failure to comply with three statutory "red lines" on EPA authority. In concluding that those challenges to the Transport

Rule had been adequately preserved, the court relied on sources that were wholly inadequate to meet the Act's "reasonable specificity" requirement.

On the merits, the court of appeals erred by invalidating the EPA's approach to significant contribution. The Act requires States to prohibit emissions "in amounts which will * * * contribute significantly" to pollution problems in other States, 42 U.S.C. 7410(a)(2)(D)(i)(I), but does not define that phrase. As the D.C. Circuit itself had previously recognized, this provision does not dictate any particular methodological approach to defining the "significan[ce]" of a contribution. *Michigan* v. *EPA*, 213 F.3d 663, 677 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). The EPA has long interpreted the provision to permit the agency to take into account the availability of cost-effective emission-reduction measures when calculating the amount of a State's significant contribution, and that interpretation is reasonable. The court of appeals' contrary and mechanically proportional approach is not compelled by the Act; it would be both more expensive and less effective than the EPA's; and it was based in significant part on court-invented hypotheticals bearing little resemblance to the complex realities of interstate air pollution.

ARGUMENT

THE COURT OF APPEALS ERRED BOTH IN ADJUDICATING CHALLENGES THAT WERE NOT PROPERLY BEFORE IT AND IN REJECTING THE EPA'S REASONABLE INTERPRETATIONS OF THE ACT

A. In Holding That The EPA's Issuance Of Federal Implementation Plans Was Premature, The Court Of Appeals Both Exceeded Its Jurisdiction And Misconstrued The Act's Substantive Requirements

The court of appeals held that, once the EPA had "quantifi[ied] each upwind State's good neighbor obligations," it was required to "giv[e] the States an initial opportunity to implement the obligations themselves through their State Implementation Plans." Pet. App. 42. The court concluded on that basis that the EPA had violated the Act by "preemptively issuing" federal plans as part of the Transport Rule. *Ibid.* In so holding, the court exceeded statutory limits on its jurisdiction and misread the Act's substantive requirements. Three aspects of the Act, taken together, make the court's errors clear.

First, the Act requires the EPA to establish air quality standards for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years (or such shorter period as [the EPA] may prescribe)" of the EPA's issuance of such a standard, "[e]ach State" is to submit to the EPA a plan that "provides for implementation, maintenance, and enforcement" of the standard. 42 U.S.C. 7410(a)(1). The Act further specifies the required content of state implementation plans. *Inter alia*, such plans "shall * * * contain adequate provisions" barring emissions of "any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interfere with

maintenance by, any other State with respect to any" air quality standard. 42 U.S.C. 7410(a)(2)(D).

Second, if a State does not submit an implementation plan during the mandatory time period, the EPA must make a finding of failure to submit. 42 U.S.C. 7410(c)(1)(A) and (k)(1)(B). If a State submits an inadequate plan, the EPA must disapprove it. 42 U.S.C. 7410(k)(3). Either of those EPA actions triggers another mandatory duty—issuance of a federal implementation plan by the EPA for the relevant State or States. Thus, the EPA "*shall* promulgate a Federal implementation plan at any time within 2 years after" it either "finds that a State has failed to make a required submission" or "disapproves a State implementation plan submission in whole or in part." 42 U.S.C. 7410(c)(1) (emphasis added); see *ibid.* (exception where "the State corrects the deficiency, and the [EPA] approves the plan or plan revision, before the [EPA] promulgates such Federal implementation plan").

Third, any petition for judicial review of an EPA action implementing the Act "shall be filed within sixty days from the date notice of such * * * action appears in the Federal Register." 42 U.S.C. 7607(b)(1); see *ibid.* (exception where "such petition is based solely on grounds arising after such sixtieth day"). "This filing period is jurisdictional in nature, and may not be enlarged or altered by the courts." *Motor & Equip. Mfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998) (quotation marks and citations omitted).

1. The court of appeals exceeded its jurisdiction by issuing a decision that effectively invalidated prior EPA determinations regarding the adequacy of various state implementation plans

For each State subject to the Transport Rule, the EPA had previously taken a final, judicially-reviewable action that either disapproved the relevant good neighbor provisions of the State's implementation plan, or found that the State had failed to submit such a plan altogether. An express and necessary premise of those administrative actions was that the States were legally required to promulgate good neighbor provisions for the relevant air quality standards, even though the EPA had not yet quantified the States' good neighbor obligations. The court of appeals in the current proceeding lacked authority to adjudicate a collateral attack on those separate administrative actions.

a. In April 2005, the EPA issued final rules finding that multiple States had failed to submit state implementation plans for the 1997 ozone and $PM_{2.5}$ air quality standards. C.A. App. 3168-3178. In June 2010 and July 2011, the EPA issued final rules finding that 29 States and territories had failed to submit such plans for the 2006 24-hour $PM_{2.5}$ standard. *Ibid.* No party sought judicial review of any of those actions. In July 2011, the EPA issued separate final rules disapproving as inadequate the good neighbor provisions of state implementation plans submitted by ten other States. *Ibid.* Only three of that last group of States sought judicial review, and those petitions (which remain pending) were not consolidated with the case below.

These disapprovals and findings of failure to submit triggered the EPA's statutory obligation to promulgate federal implementation plans within two years.

42 U.S.C. 7410(c)(1). The EPA satisfied that obligation by promulgating the Transport Rule, which included federal plans for the relevant States.[9] In holding that the agency's issuance of federal plans was premature, the court of appeals did not suggest (and could not plausibly have suggested) that the Act required the EPA to wait some greater length of time after issuing the various disapprovals and findings of failure to submit. Rather, the court held that the antecedent disapprovals and findings were themselves premature, and therefore invalid, because they were issued before the EPA had quantified the States' good neighbor obligations. Thus, the court stated that the "EPA's many [state implementation plan] disapprovals and findings of failure to submit share one problematic feature: [the] EPA made all of those findings *before* it told the States what emissions reductions their [state plans] were supposed to achieve under the good neighbor provision." Pet. App. 49a.

The only permissible way to challenge the validity of the prior EPA disapprovals and findings, however, was by filing petitions for review challenging *those actions* within 60 days of their publication in the Federal Register. 42 U.S.C. 7607(b)(1). As Judge Rogers explained, "[i]f a State wished to object that under [S]ection [7410(a)] it had no obligation to include 'good neighbor' provisions in its [state plan] until [the] EPA quantified

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[9] The EPA originally promulgated federal plans to implement CAIR in all affected States, 71 Fed. Reg. 25,328 (Apr. 28, 2006), and subsequently accepted state plans under CAIR for some of them. After CAIR was invalidated by the D.C. Circuit in *North Carolina* (thus rendering the CAIR federal and state plans inadequate), the EPA in the Transport Rule satisfied its continuing obligation to promulgate federal implementation plans for those States based on the 2005 findings of failure to submit. See pp. 32-33, *infra*.

its 'significant contribution' in emission reduction budgets, then the [Act] required it to do so at the time [the] EPA found it had not met its [state plan] 'good neighbor' obligation." Pet. App. 75a. Of course, petitioners were free to argue in the current proceeding that, even accepting the prior findings and disapprovals as valid, the federal implementation plans promulgated within the Transport Rule were arbitrary and capricious or legally infirm. But the validity of the prior EPA actions was not before the court below.

The requirement that challenges to agency rules be brought within time limits triggered by issuance of *those* rules, 42 U.S.C. 7607(b)(1), and the corresponding prohibition on untimely collateral attacks in later proceedings, serve critical purposes. They provide a bright-line rule under which the agency, regulated entities, and the public can determine which agency actions remain subject to potential judicial invalidation, and which ones can be viewed as part of the settled regulatory backdrop against which future decisions will be made. Those rules also properly limit the authority of the courts, which may review only discrete agency actions properly before them rather than attempting to superintend an entire chain of agency decision-making.

b. The court of appeals addressed the jurisdictional issue in only a spare footnote, Pet. App. 61a-62a n.34, and its analysis serves to highlight the fundamental flaws in its approach. According to the court, the Act requires the EPA to "issue a [federal implementation plan] within two years after a state fails to make a 'required submission' or submits a deficient" state plan. *Ibid.* The court found the federal implementation plans at issue here to be unlawful because "a State cannot be 'required' to implement its good neighbor obligation in a

[state implementation plan] 'submission'—nor be deemed to have submitted a deficient [state plan] for failure to implement the good neighbor obligation—until it knows the target set by [the] EPA." *Ibid.* The court concluded that respondents were challenging only the allegedly premature federal implementation plans, not the "EPA's prior disapproval of certain States'" plans. *Ibid.*

Contrary to the court of appeals' view, the trigger for the EPA's duty to issue a federal implementation plan is not the date on which a State "fails to make a 'required submission' or submits a deficient" state plan. Pet. App. 62a n.34. Instead, the EPA must act within two years after the agency "*finds* that a State has failed to make a required submission" or "*disapproves* a State implementation plan submission." 42 U.S.C. 7410(c)(1) (emphases added); see Pet. App. 80a-81a (Rogers, J., dissenting). The starting gun is fired by the EPA's administrative action, not by the States' submission or failure to submit. Indeed, the EPA made quite clear in its failure-to-submit and disapproval actions that those actions triggered the agency's obligation to promulgate federal plans within two years. *E.g.*, 75 Fed. Reg. 32,674 (June 9, 2010) ("[T]his finding establishes a 2-year deadline for promulgation by [the] EPA of a [federal implementation plan].").

To be sure, if an EPA finding or disapproval is subjected to a timely judicial challenge, and is ultimately vacated by a reviewing court, that (invalidated) EPA action cannot serve as a lawful predicate for a federal implementation plan. When no such challenge is brought, however, nothing in the Act suggests that a subsequent federal implementation plan can be declared invalid on the ground that the predicate finding or dis-

approval *should not have* been made. That approach would effectively eliminate the Act's jurisdictional 60-day deadline for petitions for review, 42 U.S.C. 7607(b)(1), of EPA decisions disapproving state plans or finding that a State had failed to submit one.

If a State thought that it was not "required" to submit a plan (*e.g.*, because the EPA had not yet quantified its good neighbor obligations), or if it thought the plan it did submit was not "deficient" for that reason (Pet. App. 62a n.34), the time to make that argument was when the EPA found to the contrary, *i.e.*, in the agency action specifically addressing the state implementation plan. Two States (respondents Indiana and Alabama) raised that argument in prior administrative proceedings before the EPA, but the agency rejected that contention, and neither State filed a petition for review. *Id.* at 76a-78a (Rogers, J., dissenting). Respondents' contention that the Transport Rule's federal implementation plans were issued prematurely is in substance an untimely (and thus jurisdictionally-barred) collateral attack on the EPA's antecedent findings and disapprovals. *Ibid.*

2. The court of appeals disregarded statutory requirements governing the necessary contents of state implementation plans, and it imposed extra-statutory requirements on the EPA

On the merits, the court of appeals erred in determining that state implementation plans need not include good neighbor provisions until the EPA has quantified a State's required level of emission reductions. Nothing in the statute requires the EPA to quantify upwind States' significant contribution obligations at all, much less makes the States' obligation to submit implementation plans with good neighbor provisions contingent upon any such EPA action. To the contrary, the States'

obligation to submit timely state plans with all required elements, including good neighbor provisions, is imposed directly by the Act itself.

a. The Act provides that each State "shall" submit a state implementation plan within three years of issuance of a new air quality standard, 42 U.S.C. 7410(a)(1), and that such plans "shall" include "adequate provisions" regulating emissions that "contribute significantly" to air quality problems in any other State, 42 U.S.C. 7410(a)(2)(D); see Pet. App. 84a-85a (Rogers, J., dissenting). The Act further requires the EPA to make a finding when a State fails to submit such a plan, and to disapprove an inadequate submission. 42 U.S.C. 7410(c)(1) and (k). Within two years of such a finding or disapproval, the EPA "shall" issue a federal implementation plan. 42 U.S.C. 7410(c).

For every State for which the EPA promulgated a federal implementation plan in the Transport Rule, the agency previously either had found that the State's submission was overdue or had disapproved a submitted state plan. Under the plain terms of the Act, the EPA therefore had not only the authority, but a mandatory duty, to promulgate federal plans for those States.

b. As explained above, the court of appeals found that the EPA lacked authority to promulgate federal implementation plans because, in the court's view, States had no obligation to submit state plans addressing the good neighbor provision until the EPA had defined their significant contribution. Pet. App. 42a-61a. The court did not cite any specific provision of the Act effecting such a carve-out from the States' statutory obligations. Rather, the court concluded that "contextual and structural factors" unambiguously prohibited the EPA from proceeding as it did. *Id.* at 54a-55a & n.32.

The court of appeals' analysis violated the basic rule that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438, 461-462 (2002) (citation omitted). The statutory language here could not be clearer. Under the Act, each State "shall" submit a state plan to the EPA within three years after the promulgation of a new or revised air quality standard, and "[e]ach such plan shall" contain adequate provisions to control emissions from the State that significantly contribute to nonattainment or interfere with maintenance in another State. 42 U.S.C. 7410(a)(2); see *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001) (Congress uses the word "'shall' to impose discretionless obligations"). Nothing in the Act makes the timing of the State's submission contingent on prior action by the EPA to define what portion of its contribution to downwind nonattainment is "significant."

Indeed, nothing in the Act requires the EPA to define the States' obligations regarding interstate pollution at all. And since Congress did not require the EPA to quantify States' good neighbor obligations, it established no deadline for the agency to do so. Thus, under the court of appeals' decision, no State is required to adopt a good neighbor provision until the EPA has completed regulatory action (the quantification of that State's good neighbor obligations) that the EPA has no obligation to take at all, much less by any particular date. And even if the EPA chooses to quantify the States' obligations (as it did in the Transport Rule), the CAA does not specify any time period within which States must thereafter adopt state implementation plans containing good neighbor provisions.

Congress adopted aggressive measures against interstate air pollution after prior efforts failed, see pp. 3-5, *supra*, and it enacted a series of tight deadlines for both state and federal implementation plans, see pp. 3, 18-19, *supra*. Making the States' good neighbor obligations contingent on legally gratuitous EPA action, without even specifying a particular deadline that such EPA action would trigger, would be quite out of keeping with the overall thrust of that regime. The "context[] and structur[e]" (Pet. App. 54a) of the relevant CAA provisions thus reinforce the natural reading of Section 7410(a)(2) itself.

By contrast, other CAA provisions expressly require action by the States only after specified EPA action. For example, the CAA makes States' submission of state implementation plans for a particular pollutant contingent upon the EPA's issuance of an air quality standard for that pollutant, and it provides States a three-year deadline measured from the EPA action. 42 U.S.C. 7410(a)(1). Likewise, "Congress's carefully crafted statutory scheme" for vehicle inspection and maintenance programs "provided the states a full year" after statutorily-mandated "EPA guidance to develop and submit" state implementation plans. *NRDC* v. *EPA*, 22 F.3d 1125, 1135 (D.C. Cir. 1994); see 42 U.S.C. 7511a(c)(3)(B). Here, by contrast, Congress did not require that the EPA quantify States' good neighbor obligations, nor did it specify any particular length of time within which the States must act if the EPA chooses to provide such quantification.

The open-ended, non-time-limited scheme contemplated by the court of appeals in this case would also be irreconcilable with the Act's emphasis on *downwind States'* timely attainment of air quality standards. See

Train v. *NRDC*, 421 U.S. 60, 86 (1975). The statute establishes specific deadlines by which those standards must be achieved, which can be as short as three years after an area is designated as nonattainment. 42 U.S.C. 7511(a)(1). And the fact that a State's inability to attain the standards is caused by pollutants coming from other States does not relieve it of the obligations associated with a nonattainment designation. *Southwestern Pa. Growth Alliance* v. *Browner*, 121 F.3d 106, 116-117 (3d Cir. 1997) (Alito, J.) (accepting the EPA's interpretation of the Act as providing "that the origin of the ozone that caused the [non-attainment] * * * is legally irrelevant"); see *id.* at 124 (Becker, J., concurring) (noting "the problem faced by communities such as the Pittsburgh-Beaver Valley area, whose herculean and largely successful efforts to combat air pollution may be derailed due to circumstances (upwind ozone) beyond its control").

Indeed, the D.C. Circuit in an earlier decision had determined that the EPA's previous rule (CAIR) did not sufficiently assure that upwind emission reductions would be in place in time for downwind nonattainment States to meet their statutory attainment deadlines. *North Carolina*, 531 F.3d at 908-912. The compliance dates in the Transport Rule were a direct response to that ruling. Pet. App. 449a-456a; see *id.* at 93a (Rogers, J., dissenting) (explaining that the EPA's actions are "well-explained by the time pressures imposed *by this court*"). In the decision below, by contrast, the court of appeals chided the EPA for acting prematurely. If allowed to stand, the court's decision would make downwind attainment within the statutory deadlines much more difficult, by allowing upwind States to ignore their obligation to address interstate pollution in a timely

fashion, and by preventing the EPA from itself addressing those obligations promptly through a timely federal implementation plan.

c. The court of appeals expressed the view that upwind States could not feasibly implement good neighbor provisions until the EPA had quantified their good neighbor obligations because those States "need[ed] more precise guidance to know how to conform their conduct to the law." Pet. App. 51a. Congress evidently did not share that view, since it made the States' obligation to adopt good neighbor provisions contingent on the EPA's promulgation of air quality standards, rather than on the EPA's quantification of various States' significant contributions to downwind nonattainment. In any event, the court of appeals was wrong as a factual matter.

To support its assumption that States cannot calculate their own significant contribution to downwind nonattainment, the court cited nothing except EPA statements to the effect that analyzing interstate contribution is complex. Pet. App. 51a-52a. In implementing the Act, however, States routinely undertake technically complex air quality determinations. *Id.* at 89a-90a (Rogers, J., dissenting). State implementation plans addressing in-state emissions, for example, are based on complex modeling to predict how emissions of numerous pollutants will interact with atmospheric conditions to create concentrations of ozone and $PM_{2.5}$, often in areas far from the sources. *E.g.*, 76 Fed. Reg. 57,856-57,857 (Sept. 16, 2011) (noting the EPA's endorsement of complex air-quality modeling completed by the California Air Resources Board). In addition, the necessary emissions information from all States is publicly available, Pet. App. 90a & n.12 (Rogers, J., dissenting), and States

not covered by CAIR or the Transport Rule have complied with the requirement to submit state implementation plans governing interstate transport. *E.g.*, 77 Fed. Reg. 1027 (Jan. 9, 2012) (EPA approval of Colorado's interstate transport SIP).

d. The court of appeals also viewed the EPA's approach in this case as inconsistent with "the States' first-implementer role under Section [7410]." Pet. App. 55a. That criticism gets the matter exactly backwards. The fact that Section 7410 "give[s] the States the first opportunity to implement the national standards EPA sets under Title I," *id.* at 54a, is precisely why the States have an initial obligation to promulgate state implementation plans that contain good neighbor provisions for particular pollutants once the EPA has promulgated air quality standards for those pollutants. To be sure, Congress *might* have decided (if it had viewed the practical concerns discussed by the court as compelling) to *except* the Act's good neighbor provisions from the general States-first approach, and to make each State's duty to implement the good neighbor provisions contingent upon prior EPA action quantifying that State's significant contribution. Congress's failure to enact such an exception, however, is fully consistent with the States-first approach reflected in Section 7410. In any event, even if there were any ambiguity on the question, the EPA's interpretation of the Act not to include such an exception (*id.* at 174a-175a) was at the least reasonable. *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868-1873 (2013).

The court of appeals read Section 7410(a)(2)(D)(i)(I) as "preserv[ing] the basic principle that States, not the Federal Government, are the primary implementers *after EPA has set the upwind States' good neighbor*

obligations." Pet. App. 54a (emphasis added). Under the plain terms of the Act, however, the EPA action that triggers the States' duty to implement good neighbor provisions is the promulgation of national air quality standards, not the quantification of individual States' good neighbor obligations. See *id.* at 84a-85a (Rogers, J., dissenting). Since the purported antecedent requirement that the EPA quantify individual States' obligations was wholly of the court's invention, there is considerable irony in the court's invocation of States-first principles as a ground for treating the EPA's federal implementation plans as premature.[10]

Under the circumstances presented here, the EPA reasonably determined that issuance of federal plans was *required* by the Act. Pet. App. 170a-175a. And even putting aside the statutory mandate, the EPA reasonably determined that timely attainment of air quality standards, and compliance with the court of appeals' mandate in *North Carolina*, required it to issue federal implementation plans. *Id.* at 175a-176a, 449a-456a. The alternative preferred by the court of appeals—the EPA

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[10] The court of appeals expressed the view that "determining the level of reductions required under Section [7410(a)(2)(D)(i)(I)] is analogous to setting [an air quality standard]." Pet. App. 53a. That analogy is inapt. Air quality standards are "*national* health-based standard[s]," *id.* at 84a (Rogers, J., dissenting) (emphasis added), while "determining the level of reductions required under Section" 7410(a)(2)(D)(i)(I) (*id.* at 53a) is an inherently State-specific task. Because States lack authority to promulgate national standards, it is unsurprising that certain state obligations are not triggered until the EPA has performed that task. That aspect of the statutory scheme provides no support for the court of appeals' conclusion that the EPA must quantify a *particular State's* significant contribution before that State is required to devise and implement its own good neighbor provision.

(a) quantifies States' good neighbor obligations; (b) then allows States sufficient time to submit state plans implementing those obligations; (c) then evaluates those state plans for sufficiency; and (d) finally issues federal plans only upon a determination of inadequacy or failure to submit (with every one of those steps separately subject to judicial review)—would have taken many years to complete. During that period, downwind States would continue to suffer the unmitigated consequences of pollution from upwind States.

e. Finally, the EPA's previous approval of state plans for some States under (the legally defective) CAIR did not eliminate its authority to issue federal plans for those States. See Pet. App. 48a n.29 (declining to address this question); State-Local Br. in Opp. 17; see also note 9, *supra*.

For each State subject to CAIR, the EPA had previously made a (judicially reviewable) finding of failure to submit state plan provisions addressing interstate pollution for the 1997 ozone and 1997 $PM_{2.5}$ standards. C.A. App. 3168-3178. The EPA then promulgated a federal plan for each of those States as part of CAIR. 71 Fed. Reg. at 25,328. The agency later approved full or partial state plans implementing the CAIR requirements for most of those States. C.A. App. 3168-3178.

The Act provides that the EPA's obligation to promulgate a federal plan is terminated only if "the State corrects the deficiency, *and* the Administrator approves the plan or plan revision." 42 U.S.C. 7410(c)(1) (emphasis added). For this group of CAIR state plans, however, only one of those requirements was satisfied. Although the EPA approved some of these state plans under CAIR, the court of appeals' decision in *North Carolina* made clear that those state plans did not actu-

ally correct the deficiencies the EPA had found in making its previous findings of failure to submit. Pet. App. 173a.

Because the deficiency has not been corrected, the EPA's statutory authority to issue federal plans for those States remained. In the Transport Rule preamble, the EPA, pursuant to its authority under 42 U.S.C. 7410(k)(6), thus corrected those earlier state plan approvals to make clear that, in light of the decision in *North Carolina*, those States had not addressed the deficiencies identified in the EPA's findings of failure to submit. Pet. App. 173a-174a.[11]

B. The Court Of Appeals Erred In Adjudicating Unpreserved Challenges To The EPA's Significant-Contribution Analysis, And In Refusing To Defer To The Agency's Reasonable Interpretation Of Statutory Terms

The court of appeals also erred in invalidating the Transport Rule based on its conclusion that the EPA's significant-contribution analysis was unambiguously foreclosed by the Act. No such statutory objection was

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[11] Even if the CAIR state plans were found to have terminated the EPA's authority to issue federal plans regarding the 1997 air quality standards, the effect on the Transport Rule would be slight. First, for all States except South Carolina and Texas, the EPA's authority to promulgate the federal plan for the annual NO_x and SO_2 requirements flows from the EPA's finding of failure to submit or disapproval of a proposed state plan for the 2006 $PM_{2.5}$ standard, which CAIR did not address. Pet. App. 143a-144a, 172a. For Texas, EPA approved only a partial CAIR state plan. 72 Fed. Reg. 41,453 (July 30, 2007). South Carolina's CAIR plan was approved after the decision in *North Carolina* made clear that such approval could not satisfy the statutory requirements, and only "in order to temporarily preserve the environmental benefits achievable under the CAIR trading programs" while EPA crafted a legally adequate replacement. 74 Fed. Reg. 53,170 (Oct. 16, 2009).

made in the administrative proceedings, and the court of appeals therefore lacked jurisdiction to decide the challenges that it ultimately found meritorious. And even if respondents' statutory claims had been properly before the court of appeals, they should have been rejected. The EPA's interpretation of the good neighbor provision reflected a reasonable construction of the statute's broad and ambiguous terms.

1. The court of appeals exceeded its jurisdiction by invalidating the Transport Rule based on statutory objections that were not made to the EPA during the administrative proceedings

a. The Act specifies that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment * * * may be raised during judicial review." 42 U.S.C. 7607(d)(7)(B). If a party "has not satisfied" that "exhaustion requirement[] in raising its objections before [the] EPA, [reviewing courts] do not have jurisdiction to hear that objection on a petition for review." *National Ass'n of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20, 2013).

The Act's "reasonable specificity" standard "requires something more than a 'general [challenge] to [the] EPA's approach.'" *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1238 (D.C. Cir. 2004) (first pair of brackets in original). Objections must "be prominent and clear enough to place the agency 'on notice,' for [the] EPA is not required to cull through all the letters it receives and answer all of the possible implied arguments." *National Ass'n of Clean Air Agencies* v. *EPA*, 489 F.3d 1221, 1231 (D.C. Cir. 2007) (internal quotation marks omitted). At bottom, the Act's exhaustion provision embodies the principle that "[s]imple fairness to

those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952).

Statutory exhaustion requirements promote sound administrative and judicial decision-making. An agency might be persuaded by an objection asserted during administrative proceedings, giving the agency a fair opportunity to avoid mistakes. *L.A. Tucker Truck Lines*, 344 U.S. at 36-37. And even if an agency does not agree with an objection, it will typically explain its rationale for rejecting it, thus promoting both reasoned agency decision-making and better informed judicial review. *Unemployment Comp. Comm'n* v. *Aragon*, 329 U.S. 143, 155 (1946).

Enforcement of statutory exhaustion requirements is especially critical in cases like this one, where the agency's "decision calls for the application of technical knowledge and experience not usually possessed by judges." *Federal Power Comm'n* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 501 (1955). In addition, enforcement of exhaustion requirements is necessary to the proper conduct of judicial review when (as here) an agency's statutory authority is challenged. As this Court recently reemphasized, when Congress leaves an "ambiguity" in a statute administered by an expert agency, it understands "that the ambiguity would be resolved, first and foremost, by the agency, and desire[s] the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *City of Arlington*, 133 S. Ct. at 1868 (quoting *Smiley* v.

Citibank (South Dakota), N.A., 517 U.S. 735, 740-741 (1996)). Congressional intent is thus frustrated—and judicial review under *Chevron* distorted—when a court interprets an agency's organic statute before the agency has been given a fair opportunity to evaluate and choose among proposed alternative constructions. *NRDC* v. *EPA*, 25 F.3d 1063, 1074 (D.C. Cir. 1994); Pet. App. 96a-98a (Rogers, J., dissenting); see *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984).

b. In invalidating the Transport Rule on statutory bases that had not been advanced in the administrative proceedings, the court of appeals in this case badly misapplied Section 7607(d)(7)(B) and disserved the important exhaustion principles underlying it.

The court of appeals held that the Transport Rule violated the Act because it crossed three "red lines that cabin [the] EPA's authority." Pet. App. 22a; see p. 14, *supra* (summarizing "red lines"). Neither the court nor respondents, however, have identified any comment in the Transport Rule record asserting, with anything approaching reasonable specificity, that the EPA's approach to significant contribution contravened any of those purported statutory limits. Respondents' failure to assert such objections is particularly glaring because the EPA's notice of proposed rulemaking explained the agency's tentative view that its proposed approach to significant contribution was consistent with the Act as construed by the court of appeals in *Michigan* and *North Carolina*. 75 Fed. Reg. 45,298-45,299 (Aug. 2, 2010). If any party disagreed with the agency's understanding of its statutory authority, and wished to preserve its challenge for judicial review, it was obligated to respond to that portion of the notice and articulate its statutory objections.

In the notice of proposed rulemaking, the EPA also explained that it had considered other approaches (some cost-based, some air quality-based, and some reflecting elements of both) but had found no compelling technical or policy reasons that supported choosing one of them over the EPA's existing approach. 75 Fed. Reg. at 45,299; C.A. App. 2306-2320. If respondents believed that the statute *required* the EPA to adopt one of those alternative regulatory approaches, they should have articulated that position "with reasonable specificity" during the administrative proceedings. 42 U.S.C. 7607(d)(7)(B); see generally *DOT* v. *Public Citizen*, 541 U.S. 752, 764-765 (2004) (a party "forfeit[s]" a claim that an agency erred by not considering alternatives to its adopted rulemaking approach if it does not propose such alternatives in the administrative proceedings).

This case amply illustrates the importance of enforcing statutory exhaustion requirements. The court of appeals ultimately held that the Transport Rule violated the CAA because, in the court's view, the EPA's two-step approach could lead an upwind State to lower its emissions below the threshold that the Transport Rule's screening step used to subject that State to further analysis. Pet. App. 34a-35a. But because respondents never presented that objection to the agency, the EPA had no incentive during the rulemaking to evaluate the practical likelihood of such an occurrence, see *id.* at 95a & n.15, or to consider whether some backstop mechanism should be adopted to prevent it from happening. When respondents first raised that argument in the court of appeals, the EPA's answering brief cited relevant data and asserted that "such a scenario is extremely *unlikely* to occur." Gov't C.A. Br. 33-34 & n.20. The court of appeals nevertheless vacated the Transport

Rule in its entirety, based on a theoretical possibility that objecting parties never gave the agency an opportunity to evaluate or address.

c. In arguing that objections based on the court of appeals' statutory "red-lines" were preserved during the administrative proceedings, the court of appeals and respondents have pointed to several statements made to or by the EPA. None of those sources comes close to satisfying the CAA's "reasonable specificity" requirement.

i. *The court of appeals' decision in* North Carolina. The court of appeals apparently thought that its 2008 decision in *North Carolina* was sufficient to place the EPA on notice of the statutory objections to the Transport Rule that the court in this case found to be meritorious. Pet. App. 32a n.18; see Industry-Labor Br. in Opp. 17-18. A court decision, especially one issued *before* a notice of proposed rulemaking, is plainly not "an objection to a rule or procedure" proposed in that notice. 42 U.S.C. 7607(d)(7)(B). An "objection" is made by a party in administrative proceedings, not by appellate judges reviewing them. Any party who believed that the EPA's proposed approach was inconsistent with the *North Carolina* court's construction of the Act was obligated to make that argument with reasonable specificity during the administrative process that produced the Transport Rule.[12]

ii. *CAIR comments.* The court of appeals also thought that respondents' statutory objections were preserved by a comment filed in the CAIR proceeding

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[12] Judge Rogers, the only panel member in this case who was also a panel member in *North Carolina*, viewed the Transport Rule as entirely consistent with the court of appeals' analysis in *North Carolina*. Pet. App. 68a, 69a, 102a-104a.

more than six years before the rule at issue here was promulgated. Pet. App. 32a n.18 (citing 70 Fed. Reg. 25,176-25,177 (May 12, 2005)). An objection may be asserted in court only if it was "raised with reasonable specificity *during the period for public comment*" on the particular agency action that is the subject of the petitioner's challenge, 42 U.S.C. 7607(d)(7)(B) (emphasis added), *i.e.*, after the notice of proposed rulemaking that preceded the final rule. The D.C. Circuit had previously enforced that rule, holding that comments filed before the relevant notice of proposed rulemaking are "inadequate to preserve [an] argument for consideration" in court. *Sierra Club* v. *EPA*, 353 F.3d 976, 991 (2004). The CAIR docket was not incorporated into the docket of this rulemaking, Pet. App. 106a (Rogers, J., dissenting), and an agency should be under no obligation to sift through old comments filed before a notice of proposed rulemaking and respond to every unrenewed objection they contain.

iii. *Notice of Proposed Rulemaking.* The court of appeals appears to have believed that it would have been pointless for parties to assert their statutory objections to the EPA's proposed approach because, in issuing its notice of proposed rulemaking, the agency stated that it had "evaluated a number of alternative approaches," including "air quality-only approaches," and was "not proposing any of the alternative approaches." Pet. App. 33a n.18 (quoting 75 Fed. Reg. at 45,299); see Industry-Labor Br. in Opp. 17, 18, 24 n.11; see also C.A. App. 2308-2312. Nothing in Section 7607(d)(7)(B), however, excuses non-compliance with the exhaustion requirement simply because the EPA has adopted a tentative approach in a notice of proposed rulemaking. Because notices of proposed rulemaking frequently express a

tentative preference for a particular course of action, the exhaustion requirement would be substantially undermined if objections to such preferences were viewed as "futile" and therefore unnecessary. And even if the notice of proposed rulemaking had expressed an unshakeable *policy* preference for a regulatory approach that treated cost as one relevant factor, objecting parties were required to argue with reasonable specificity that a different approach was *compelled by the Act* in order to preserve that statutory argument for judicial review. See p. 37, *supra*.

iv. *Wisconsin comments.* The court of appeals also cited as support for its jurisdictional holding one sentence from comments filed by Wisconsin. Pet. App. 34a n.18 (quoting C.A. App. 1293) (The "'EPA needs to primarily depend on air quality results instead of control costs in defining' significant contributions."); see Industry-Labor Br. in Opp. 19. Wisconsin was making a policy argument; the portion of the State's comments upon which the court of appeals relied did not even cite any provision of the Act, much less argue that the EPA's approach was foreclosed by it. C.A. App. 1293. Arguments that an alternative regulatory approach is preferable as a policy matter to the agency's proposed course of action are plainly insufficient to preserve the claim that the statute *compels* adoption of the alternative. *Cement Kiln Recycling Coal.* v. *EPA*, 255 F.3d 855, 860-861 (D.C. Cir. 2001); *NRDC*, 25 F.3d at 1074; Pet. App. 97a-98a (Rogers, J., dissenting). Moreover, Wisconsin argued that the EPA should have adopted *more* stringent controls based on air quality impacts (the opposite of the court of appeals' conclusion). C.A. App. 1293; see Pet. App. 98a-100a (Rogers, J., dissenting).

v. *Tennessee comments.* Comments filed by Tennessee (Pet. App. 34a n.18; Industry-Labor Br. in Opp. 19) likewise asserted no statutory objection to the EPA's approach. Pet. App. 98a (Rogers, J., dissenting). And, even as a policy matter, "Tennessee's comment does not even suggest a policy preference that the one percent of [air quality standard] threshold level be a floor." *Ibid.*; see C.A. App. 556.

vi. *Delaware comments.* Like the comments of Wisconsin and Tennessee, Delaware's comments (Pet. App. 34a n.18; Industry-Labor Br. in Opp. 19) expressed a policy "opinion," in Delaware's case that the EPA should put more emphasis on air quality in its significant-contribution analysis, but they did not contend that the Act required the agency to do so. Pet. App. 100a n.16 (quoting C.A. App. 1756). And, in any event, Delaware (primarily a downwind State, J.A. 233, appearing in this Court as respondent in support of *petitioners*) was arguing for greater upwind emission reductions—the opposite of what the court of appeals concluded was dictated by the Act. *E.g.*, J.A. 224, 233 ("The proposal does not offer necessary relief to downwind states.") (emphasis omitted).

vii. *West Virginia comments.* In their brief in opposition, respondents contended for the first time that a comment filed by West Virginia preserved their statutory arguments. Industry-Labor Br. in Opp. 23. This basis for claiming preservation was not asserted in the court of appeals and is therefore waived. In any event, West Virginia's comment (like all the others cited by respondents and the court of appeals) did not assert that the EPA's proposed approach was beyond the agency's statutory authority. Instead, West Virginia generally supported the EPA's approach (J.A. 235), but requested

additional data in tabular form and expressed a technical concern about "limited measurement precision" (J.A. 240-241).

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In sum, because no "objection" based on the court of appeals' "red lines" was "raised with reasonable specificity during the period for public comment" on the Transport Rule, the court of appeals erred by permitting such objections to be "raised during judicial review." 42 U.S.C. 7607(d)(7)(B).

2. On the merits, the court of appeals erred in invalidating the EPA's approach to significant contribution

a. The good neighbor provision requires state plans to "contain adequate provisions * * * prohibiting * * * any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will * * * contribute significantly to nonattainment in, or interference with maintenance by, any other State with respect to any [air quality standard]." 42 U.S.C. 7410(a)(2)(D)(i)(I). The Act does not define the phrase at the heart of this provision—"amounts that will * * * contribute significantly" to air pollution in other States—or any of its constituent words.

Since the EPA first comprehensively addressed this provision in 1998, the agency has interpreted it to permit consideration of costs in assessing what portion of a State's contribution to pollution elsewhere should be considered "significant." In the NO_x SIP Call, the EPA "uniformly required that each [S]tate reduce [NO_x] * * * by the amount accomplishable by what [the] EPA dubbed 'highly cost-effective controls,' namely, those controls [the] EPA found capable of removing NO_x at a cost of $2000 or less per ton." *Michigan*, 213 F.3d at

669. The court of appeals in *Michigan* upheld that approach. *Id.* at 677-680; see *North Carolina*, 531 F.3d at 916-917 (declining to disturb CAIR's similar approach to significant contribution).

As the *Michigan* court explained, the "fundamental" question is whether the EPA must "simply pick some flat 'amount' of contribution, based exclusively on health concerns, such that any excess would put a [S]tate in the forbidden zone of 'significance'"; or whether it was instead "permissible for [the] EPA to consider differences in cutback costs, so that, after reduction of all that could be cost-effectively eliminated, any remaining 'contribution' would not be considered 'significant.'" 213 F.3d at 677. Because the court of appeals in *Michigan* found no "clear congressional intent to preclude consideration of cost," it concluded that the second, cost-based approach was permissible. *Ibid.* (citation omitted). As the court explained, the "term 'significant' does not in itself convey a thought that significance should be measured in only one dimension—here, * * * health alone." *Ibid.* The court noted that a contrary approach, under which costs are disregarded, would produce unreasonable results. "[I]f faced with two states, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost of less than $5000 a ton," analysis without consideration of cost-effectiveness would "mandate the same cutback for each." *Id.* at 676.

The *Michigan* court's endorsement of the EPA's consideration of cost-effectiveness is consistent with this Court's approach in analogous circumstances. The Court has recognized, for example, that the EPA "may consider whether it is economically or technologically possible for [a] state plan" submitted under the Act "to

require more rapid progress than it does," and that the agency may reject a state plan when it concludes that more rapid progress is feasible. *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 264 n.13 (1976). The Court more recently stressed that, except where consideration of costs is expressly precluded by statute, agencies should be allowed to consider costs in construing broad qualitative standards, so that they can identify the most efficient and least burdensome mechanisms to achieve a statutory goal. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (considering a Clean Water Act, 33 U.S.C. 1251 *et seq.*, "best technology available" standard and observing that, although the technology that achieves the maximum environmental benefit could be viewed as the "best," the term also could be used to describe the technology that is "*most efficient[]*" from a cost-benefit perspective). And, citing *Michigan*, this Court has specifically noted the D.C. Circuit's conclusion that the good neighbor provision, unlike the Act's air quality-standard-setting provisions, does *not* preclude the consideration of costs. *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 469 n.1 (2001).

During the rulemaking that produced the Transport Rule, the EPA again considered cost-effectiveness in defining significant contribution, but it integrated air quality analysis into its selection of the relevant cost thresholds to a *greater* degree than it had in the NO_x SIP Call upheld in *Michigan*. Pet. App. 421a. In particular, the Transport Rule employed "an analysis that accounts for *both* cost and air quality improvement to identify the portion of a [S]tate's contribution that constitutes its significant contribution to nonattainment and interference with maintenance." *Id.* at 316a (emphasis added); see note 7, *supra*.

The EPA's approach to the good neighbor provision's ambiguous and undefined terms was reasonable here for the same reasons it was reasonable in *Michigan*. Nothing in the CAA precluded the EPA from considering the ability of cost-effective controls to mitigate interstate pollution as part of its significant-contribution analysis, and its decision to do so was a reasonable construction of the Act's ambiguous terms. *City of Arlington*, 133 S. Ct. at 1871-1873; *Chevron*, 467 U.S. at 842-845; *Michigan*, 213 F.3d at 677-680. Deference is especially appropriate where, as here, an expert agency construes ambiguous statutory terms addressing matters that are "technical, complex, and dynamic." *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002). Indeed, in *Chevron* itself the Court deferred to the EPA's interpretation of an ambiguous term ("stationary source") in the Clean Air Act. See 467 U.S. at 845-866.

b. Despite its previous endorsement of the EPA's consideration of costs as part of the significant-contribution analysis, the court of appeals in this case invalidated that approach on the ground that it transgressed three statutory "red lines" the court discerned in the good neighbor provision. Pet. App. 22a; see p. 14, *supra* (cataloguing the court's "red lines"). The court's analysis was misconceived. The term "red line" suggests an express and prominent statutory limit on an agency's authority. The court below, however, identified no language in the Act that expressly established any of the three limits the court discerned.

i. *Proportionality*. The court of appeals held that the Act unambiguously requires the EPA to allocate upwind States' emission-reduction obligations on a strictly proportional basis calculated only in reference to air quality factors, so that each upwind State would

shoulder only "its own fair share." Pet. App. 25a; see *id.* at 24a-27a, 38a-39a. The court viewed the Act as unambiguously precluding the agency from basing such reduction obligations in part on cost-effectiveness.[13]

Nothing in the key statutory phrase "amounts that will * * * contribute significantly," 42 U.S.C. 7410(a)(2)(D)(i)(I), or in any other provision of the Act, compels any such strict air quality-only methodological approach. *Michigan*, 213 F.3d at 677. Interstate air pollution is a complex phenomenon, characterized by numerous upwind/downwind linkages, differing amounts of contribution to and from different States, spatial and geographic differences among States, and the complexities of ozone and $PM_{2.5}$ formation. See pp. 5-8, *supra*. The problem is thus not amenable to the kind of simplistic proportionality approach the court of appeals thought unambiguously required, and the Act provides

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[13] The court of appeals acknowledged that its "decisions in *Michigan* and *North Carolina* establish that EPA may consider cost," but it viewed that principle as applicable only when cost considerations are used "to further lower an individual State's obligations." Pet. App. 27a. It is unclear, however, how the EPA's consideration of cost even for that purpose would be consistent with the court of appeals' overall statutory analysis. The Act requires States to submit implementation plans that "prohibit[]" emissions "in amounts which will * * * contribute significantly to nonattainment" with the air quality standards. 42 U.S.C. 7410(a)(2)(D)(i). If, as the court of appeals held, the "amounts" that will have that effect must be defined without reference to the cost of achieving reductions, no other provision of the Act allows States (or authorizes the EPA to allow States) to invoke costs as a reason not to prohibit the emissions after all. The only textually sound basis for considering costs in determining what emission reductions are legally required is the rationale consistently used by the EPA—*i.e.*, that costs are relevant to whether emissions from particular States "contribute *significantly* to" downwind nonattainment.

no indication that Congress intended to dictate that methodology.

To illustrate, first consider a downwind nonattainment area (Area A) that receives relatively equal amounts of pollution contributions from three upwind States, X, Y, and Z. A strict proportionality requirement would compel the EPA to identify the portion of the problem attributable at one specific point in time to each upwind State and then divide the upwind share among States X, Y, and Z "in proportion to the size of their contributions to the downwind State's nonattainment." Pet. App. 25a. The court of appeals built its proportionality interpretation of the good neighbor provision entirely on its application to such a scenario. *Id.* at 25a-26a & n.15.

In the real world, however, interstate pollution transport does not remotely resemble the court of appeals' simple model. To demonstrate this using a variation of the above scenario, imagine that States Y and Z also contribute relatively higher amounts to nonattainment in other areas (Areas B and C, respectively), while State X contributes a relatively small (but still "significant") amount to nonattainment in a fourth area (Area D). These facts may require States Y and Z to make relatively larger emission reductions to address their contributions to Areas B and C. With respect to Area A, however, where States Y and Z constitute two-thirds of the upwind contribution, the likely result of such larger reductions would be some degree of incidental "overcontrol," as well as a lack of "proportionality" among States X, Y, and Z. Similarly, because State X is a relatively small contributor to nonattainment in Area D, the relatively larger reductions it would have to make to satisfy its share of the upwind contribution to Area A

would likely cause some lack of proportionality and some overcontrol with respect to Area D.

Even that revised hypothetical does not match the realities of interstate air pollution. In a typical real-world case, a downwind area will have far more than the three upwind contributors; those upwind contributions will vary widely in their degree of transported emissions; and each upwind State will typically contribute in varying amounts to downwind nonattainment and maintenance problems in numerous areas, not just one or two. C.A. App. 2312; Pet. App. 256a-259a, 269a-309a; see pp. 5-8, *supra*. The court of appeals' notion of "proportionality" cannot be sensibly applied under these circumstances.

The court of appeals appeared to believe that its proportionality requirement was necessary to prevent upwind States from being required to excessively reduce emissions that contribute to air quality problems in downwind States whose own emissions, by themselves, put them out of attainment with air quality standards. Pet. App. 26a n.15, 39a. Once again, this hypothetical concern does not resemble any real-world scenario. For the three air quality standards addressed in the Transport Rule, the pollution contribution from the downwind State itself was in *all* cases below the level required by the standard. Compare J.A. 177-185 (in-state contributions) with Pet. App. 166a-167a (air quality standards).[14] The court of appeals also ignored the fact

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[14] There also is no basis for the court of appeals' concern that, under the EPA's approach, an upwind State could be required to "reduce more than the State's total emissions that go out of State." Pet. App. 38a n.23 (emphasis omitted); see *id.* at 23a. The pollution that travels beyond an upwind State's borders is not separate and distinct from the pollution with local impacts. The only way to reduce 100%

that downwind nonattainment areas are subject to stringent control obligations under separate provisions of the Act, 42 U.S.C. 7501-7515, and thus typically have already undertaken vastly greater pollution-control efforts than have contributing States that have attained air quality standards within their own borders.

The court of appeals' proportionality approach also does not take into account a separate but highly relevant consideration, namely that different States (both upwind and downwind) had made very different degrees of pollution-control progress (and corresponding pollution-control investments) at the time the Transport Rule was promulgated. To illustrate the effect that such cost differentials may have, again consider the simple hypothetical discussed above, where States X, Y, and Z contribute equal amounts to downwind nonattainment in Area A. Under the court of appeals' proportional approach, each of the three States must be required to make one-third of the total needed upwind emission reductions with respect to Area A. However, if States X and Y have previously made substantial pollution-control investments (thus *already* lowering their proportionate share of interstate pollution), but State Z's investments have been negligible, the next increment of emissions control in States X and Y might be substantially more expensive than those in State Z.

There is no reason to think—and certainly no clear indication in the statutory text—that Congress intended

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of a State's contribution to a downwind area therefore would be to eliminate 100% of its emissions. As explained in the text, however, the Transport Rule was specifically designed to avoid such draconian results, and instead required only those cost-effective emission reductions in each upwind State that would achieve appropriate downwind air-quality results.

to deny the EPA authority to take facts such as these into account in defining each State's obligations, even if the effect of that approach were to reduce State Z's relatively less controlled emissions by somewhat more than one-third of the total upwind contributions to Area A. That is especially true since, in the real world, State Z would likely contribute to nonattainment and maintenance problems in other downwind areas as well, and might even have nonattainment and maintenance problems of its own.

As noted previously (p. 37, *supra*), the EPA formally evaluated approaches such as that endorsed by the court of appeals, under which the agency would "utilize air quality contribution modeling, then determine reductions in emissions based solely on the results of this modeling." C.A. App. 2308. The agency rejected such alternatives because they could impose infeasibly large and expensive emission-reduction requirements on States whose sources were already well controlled, and because it was not mathematically possible to calculate an upwind State's proportional responsibility where, as is typically the case, that State "contribute[s] to multiple downwind monitors (in multiple states) and would have a different reduction percentage for each one." C.A. App. 2309-2310, 2312. The court of appeals noted that the EPA had considered such alternatives at the proposal stage (Pet. App. 40a n.24), but made no mention of the agency's reasons for rejecting them or the fact that no party in subsequent comments had advocated the court of appeals' preferred approach (much less argued that it was statutorily compelled).

ii. *Overcontrol.* The court of appeals also erred by basing its facial invalidation of the Transport Rule on a theoretical and misplaced concern that the rule failed to

"ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary overcontrol in the downwind States." Pet. App. 39a; see *id.* at 27a-29a, 39a-41a. Again, the court of appeals cited nothing from the administrative record to support this concern, *ibid.*, but instead relied on a hypothetical of its own creation, involving two upwind States that contribute to a common downwind nonattainment problem. *Id.* at 28a n.16. The court of appeals reasoned that "[i]f EPA modeling showed that all downwind nonattainment would be resolved if those two upwind States' combined reduction obligations were, say, 10% lower, EPA would have to ratchet back the upwind States' reduction obligations by a total of 10%." *Ibid.*

This hypothetical fails for the same reason as the others invented by the court of appeals. It ignores the hundreds of overlapping linkages among dozens of upwind states and downwind areas, and the fact that these relationships can only be fairly assessed in light of emissions information, meteorological data, and a host of other technical variables. Given the complexities of interstate pollution transport and the web of interconnecting upwind/downwind linkages, the mere fact that application of the Transport Rule may not result in every downwind area stopping "on a dime" at the precise level of an air quality standard cannot be said to demonstrate impermissible "overcontrol" in any particular upwind State.

For example, in addressing upwind States' contributions to a highly polluted area in the Northeast, the EPA may incidentally bring some monitors in the Southeast below the level needed for attainment, because some of the same upwind States that contribute to the area in the Northeast also contribute to the (rela-

tively less polluted) area in the Southeast. There is, however, no way to channel the reductions aimed at reducing contribution to a particular area to ensure that they benefit that area exclusively. Nor would it make sense to reduce the upwind controls to avoid overcontrol in the Southeastern area, because such action would automatically result in undercontrol with respect to the Northeastern area.

There are, however, more refined and appropriate ways to tailor upwind control requirements to actual downwind air quality problems, and the EPA pursued such approaches here. Through extensive study of emissions data, cost data, and air quality modeling, the EPA determined the amounts of emission reductions that were available in each State at ascending levels of cost, and the resulting air quality impacts that would result from controls set at each of those possible cost levels. Pet. App. 316a-349a; C.A. App. 2945-2968. The EPA ultimately established state emission budgets at levels that were both feasible from the upwind States' perspective and appropriate in terms of the air-quality needs of the downwind areas to which they were linked.

Contrary to the court of appeals' unsupported assumption (Pet. App. 31a), in making these determinations, the EPA *did* tailor its approach to take account of the extent of the downwind nonattainment and maintenance problem to be addressed. With regard to $PM_{2.5}$ nonattainment and maintenance problems, for example, the EPA split the States subject to the rule into two groups, depending on the severity of the downwind nonattainment or maintenance problem to which they were linked. *Id.* at 356a-379a, 385a-387a. For States linked only to less severe downwind $PM_{2.5}$ nonattainment or maintenance problems, the EPA based its SO_2

emission control requirements on a relatively less stringent $500 per ton cost threshold, while States linked to more severe downwind problems were assigned emission budgets based on a higher ($2300 per ton), although still cost-effective, cost threshold starting in 2014. *Ibid.*

Although the EPA believed that the overall control regime produced beneficial and appropriate downwind results, it hardly can be said to have imposed any significant amount of avoidable over-control. Indeed, in the EPA's final air-quality modeling, several populous locations were projected to continue experiencing nonattainment or maintenance problems despite the emission reductions required by the Transport Rule. For example, four areas (including Chicago and Detroit) are projected to have 24-hour $PM_{2.5}$ nonattainment or maintenance problems, while two areas (Houston and Baton Rouge) will have ozone problems. Pet. App. 131a, 313a.

In any event, to the extent respondents believed that the EPA's approach was too stringent with regard to any particular State, they were free to raise such State-specific concerns in rulemaking comments, and to seek judicial review under the arbitrary-and-capricious standard if they viewed the agency's response as inadequate. 42 U.S.C. 7607(d)(9)(A). Instead of requiring that conventional approach, however, the court of appeals facially invalidated the rule as inconsistent with the unambiguous terms of the Act, based on the mere hypothetical possibility of such a challenge. Neither the Act itself nor any established principle of administrative law warranted that disproportionate holding.

iii. *Screening "floor."* In developing the Transport Rule, the EPA "used air quality modeling to determine which upwind states [were] projected to contribute at or above threshold levels to the air quality problems in"

downwind nonattainment and maintenance areas. Pet. App. 137a-138a. "States whose contributions [were] below the thresholds [were] not included in the Transport Rule for that [air quality standard]." *Id.* at 255a. The court of appeals expressed concern that the Transport Rule could have the ultimate practical effect of requiring some upwind States to reduce their emissions to levels below the threshold amounts that the EPA had used in its initial screening analysis. *Id.* at 35a; see *id.* at 31a-38a. In the court's view, that possibility meant that the EPA had exceeded its authority to regulate pollutants in "'amounts which will . . . contribute significantly' to downwind attainment problems." *Id.* at 36a-37a (quoting 42 U.S.C. 7410(a)(2)(D)(i)).

The court of appeals' analysis is misguided. The court did not suggest that the EPA had set out to regulate emissions that will contribute *in*significantly to downwind nonattainment, or even that the Transport Rule is likely to have that effect—only that the Rule does not eliminate that possibility. Given the uncertainties associated with amelioration of interstate pollution, a particular regulatory regime may be a reasonable and lawful means of preventing emissions in "amounts which will * * * contribute significantly" to downwind nonattainment, even if it incidentally sweeps in some emissions that would not have that effect.

In any event, the court of appeals' concern was entirely hypothetical. The court cited nothing in the record showing that the scenario it hypothesized was a realistic possibility. Pet. App. 95a n.15 (Rogers, J., dissenting). And because no party advanced that argument in the administrative proceedings, the EPA did not address it in the rulemaking. As noted above, when the EPA did analyze the question during the preparation of

its court of appeals brief, it found that such a scenario was highly unlikely to occur. See p. 37, *supra*. If the course of events that the court of appeals described unexpectedly materialized, and if a party believed it led to an arbitrary result with respect to the relevant State, the party would have, at most, the basis for a focused arbitrary-and-capricious challenge, not support for wholesale invalidation of the Transport Rule.

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In sum, the court of appeals should have deferred to the EPA's reasonable interpretations of the Act's broad and ambiguous terms, rather than finding the agency's methodology to be unambiguously foreclosed by statutory "red lines" of the court's own creation.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 42 U.S.C. 7410 provides:

State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within 3 years (or such shorter period as the Administrator may prescribe) after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such sec-

ondary standard at the hearing required by the first sentence of this paragraph.

(2) Each implementation plan submitted by a State under this chapter shall be adopted by the State after reasonable notice and public hearing. Each such plan shall—

(A) include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter;

(B) provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to—

(i) monitor, compile, and analyze data on ambient air quality, and

(ii) upon request, make such data available to the Administrator;

(C) include a program to provide for the enforcement of the measures described in subparagraph (A), and regulation of the modification and construction of any stationary source within the areas covered by the plan as necessary to assure that national ambient air quality standards are achieved, including a permit program as required in parts C and D of this subchapter;

(D) contain adequate provisions—

(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emis-

sions activity within the State from emitting any air pollutant in amounts which will—

(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard, or

(II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility,

(ii) insuring compliance with the applicable requirements of sections 7426 and 7415 of this title (relating to interstate and international pollution abatement);

(E) provide (i) necessary assurances that the State (or, except where the Administrator deems inappropriate, the general purpose local government or governments, or a regional agency designated by the State or general purpose local governments for such purpose) will have adequate personnel, funding, and authority under State (and, as appropriate, local) law to carry out such implementation plan (and is not prohibited by any provision of Federal or State law from carrying out such implementation plan or portion thereof), (ii) requirements that the State comply with the requirements respecting State boards under section 7428 of this title, and (iii) necessary assurances that, where the State has relied on a local or regional government, agency, or instrumentality for the implementation of any plan provision, the State

has responsibility for ensuring adequate implementation of such plan provision;

(F) require, as may be prescribed by the Administrator—

(i) the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps, by owners or operators of stationary sources to monitor emissions from such sources,

(ii) periodic reports on the nature and amounts of emissions and emissions-related data from such sources, and

(iii) correlation of such reports by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection;

(G) provide for authority comparable to that in section 7603 of this title and adequate contingency plans to implement such authority;

(H) provide for revision of such plan—

(i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of attaining such standard, and

(ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to the Administrator that the plan is substantially inadequate to attain the national ambient air quality standard which it imple-

ments or to otherwise comply with any additional requirements established under this chapter;

(I) in the case of a plan or plan revision for an area designated as a nonattainment area, meet the applicable requirements of part D of this subchapter (relating to nonattainment areas); .

(J) meet the applicable requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), and part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection);

(K) provide for—

(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard, and

(ii) the submission, upon request, of data related to such air quality modeling to the Administrator;

(L) require the owner or operator of each major stationary source to pay to the permitting authority, as a condition of any permit required under this chapter, a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, the reasonable costs of implementing and enforcing the terms and conditions of any such permit (not including any court costs or

other costs associated with any enforcement action),

until such fee requirement is superseded with respect to such sources by the Administrator's approval of a fee program under subchapter V of this chapter; and

(M) provide for consultation and participation by local political subdivisions affected by the plan.

(3)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(1), Nov. 15, 1990, 104 Stat. 2409.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this chapter and the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 791 et seq.], review each State's applicable implementation plans and report to the State on whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator, in the case of a plan (or portion thereof) promulgated under subsection (c) of this section, shall be required to revise an applicable implementation plan because one or more exemptions under section 7418 of this title (relating to Federal facilities), enforcement orders under section 7413(d)[1] of this title, suspensions under subsection (f) or (g) of this section (relating to temporary energy or economic authority), orders under section 7419 of this title (relating to primary nonferrous smelters), or extensions of compliance in decrees entered under section 7413(e)[1] of this title (relating to iron- and steel-producing operations) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, or extensions had been granted.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(2), Nov. 15, 1990, 104 Stat. 2409.

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include

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[1] See References in Text note below.

any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under this subsection to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under subsection (c) of this section respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of subsection (c)(2)(D)(ii) of this section), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or

assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program".

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 7413(d)[1] of this title or section 7419 of this title (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) Extension of period for submission of plans

The Administrator may, wherever he determines necessary, extend the period for submission of any

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[1] See References in Text note below.

plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

(c) Preparation and publication by Administrator of proposed regulations setting forth implementation plan; transportation regulations study and report; parking surcharge; suspension authority; plan implementation

(1) The Administrator shall promulgate a Federal implementation plan at any time within 2 years after the Administrator—

(A) finds that a State has failed to make a required submission or finds that the plan or plan revision submitted by the State does not satisfy the minimum criteria established under subsection (k)(1)(A) of this section, o.

(B) disapproves a State implementation plan submission in whole or in part,

unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

(2)(A) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(A), Nov. 15, 1990, 104 Stat. 2409.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon June 22, 1974. This subparagraph shall not prevent

the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(B), Nov. 15, 1990, 104 Stat. 2409.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after June 22, 1974, by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such

area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) Repealed. Pub. L. 101-549, title I, § 101(d)(3)(C), Nov. 15, 1990, 104 Stat. 2409.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after August 7, 1977, be revised to include comprehensive measures to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of an implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D of this subchapter.

(d), (e) Repealed. Pub. L. 101-549, title I, § 101(d)(4), (5), Nov. 15, 1990, 104 Stat. 2409

(f) National or regional energy emergencies; determination by President

(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan or of any requirement

under section 7651j of this title (concerning excess emissions penalties or offsets) may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan or of any requirement under section 7651j of this title (concerning excess emissions penalties or offsets) adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Admin-

istrator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10[2] of this title, as in effect before August 7, 1977, or section 7413(d)[2] of this title, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g) Governor's authority to issue temporary emergency suspensions

(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

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[2] See References in Text note below.

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within 12 months of submission of the proposed plan revision, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard to whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 1857c-10[2] of this title as in effect before August 7, 1977, or under section 7413(d) of this title upon a finding that such source is unable to comply with such schedule (or increment) solely because of the

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[2] See References in Text note below.

conditions on the basis of which a suspension was issued under this subsection.

(h) Publication of comprehensive document for each State setting forth requirements of applicable implementation plan

(1) Not later than 5 years after November 15, 1990, and every 3 years thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Modification of requirements prohibited

Except for a primary nonferrous smelter order under section 7419 of this title, a suspension under subsection (f) or (g) of this section (relating to emergency suspensions), an exemption under section 7418 of this title (relating to certain Federal facilities), an order under section 7413(d)[2] of this title (relating to compliance orders), a plan promulgation under subsection (c) of this section, or a plan revision under subsection (a)(3) of this section, no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

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[2] See References in Text note below.

(j) Technological systems of continuous emission reduction on new or modified stationary sources; compliance with performance standards

As a condition for issuance of any permit required under this subchapter, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used at such source will enable it to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this chapter.

(k) Environmental Protection Agency action on plan submissions

(1) Completeness of plan submissions

(A) Completeness criteria

Within 9 months after November 15, 1990, the Administrator shall promulgate minimum criteria that any plan submission must meet before the Administrator is required to act on such submission under this subsection. The criteria shall be limited to the information necessary to enable the Administrator to determine whether the plan submission complies with the provisions of this chapter.

(B) Completeness finding

Within 60 days of the Administrator's receipt of a plan or plan revision, but no later than 6 months after the date, if any, by which a State is required

to submit the plan or revision, the Administrator shall determine whether the minimum criteria established pursuant to subparagraph (A) have been met. Any plan or plan revision that a State submits to the Administrator, and that has not been determined by the Administrator (by the date 6 months after receipt of the submission) to have failed to meet the minimum criteria established pursuant to subparagraph (A), shall on that date be deemed by operation of law to meet such minimum criteria.

(C) Effect of finding of incompleteness

Where the Administrator determines that a plan submission (or part thereof) does not meet the minimum criteria established pursuant to subparagraph (A), the State shall be treated as not having made the submission (or, in the Administrator's discretion, part thereof).

(2) Deadline for action

Within 12 months of a determination by the Administrator (or a determination deemed by operation of law) under paragraph (1) that a State has submitted a plan or plan revision (or, in the Administrator's discretion, part thereof) that meets the minimum criteria established pursuant to paragraph (1), if applicable (or, if those criteria are not applicable, within 12 months of submission of the plan or revision), the Administrator shall act on the submission in accordance with paragraph (3).

(3) Full and partial approval and disapproval

In the case of any submittal on which the Administrator is required to act under paragraph (2), the

Administrator shall approve such submittal as a whole if it meets all of the applicable requirements of this chapter. If a portion of the plan revision meets all the applicable requirements of this chapter, the Administrator may approve the plan revision in part and disapprove the plan revision in part. The plan revision shall not be treated as meeting the requirements of this chapter until the Administrator approves the entire plan revision as complying with the applicable requirements of this chapter.

(4) Conditional approval

The Administrator may approve a plan revision based on a commitment of the State to adopt specific enforceable measures by a date certain, but not later than 1 year after the date of approval of the plan revision. Any such conditional approval shall be treated as a disapproval if the State fails to comply with such commitment.

(5) Calls for plan revisions

Whenever the Administrator finds that the applicable implementation plan for any area is substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in section 7506a of this title or section 7511c of this title, or to otherwise comply with any requirement of this chapter, the Administrator shall require the State to revise the plan as necessary to correct such inadequacies. The Administrator shall notify the State of the inadequacies, and may establish reasonable deadlines (not to exceed 18 months after the date of such notice) for the submission of

such plan revisions. Such findings and notice shall be public. Any finding under this paragraph shall, to the extent the Administrator deems appropriate, subject the State to the requirements of this chapter to which the State was subject when it developed and submitted the plan for which such finding was made, except that the Administrator may adjust any dates applicable under such requirements as appropriate (except that the Administrator may not adjust any attainment date prescribed under part D of this subchapter, unless such date has elapsed).

(6) Corrections

Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

***(l)* Plan revisions**

Each revision to an implementation plan submitted by a State under this chapter shall be adopted by such State after reasonable notice and public hearing. The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), or any other applicable requirement of this chapter.

(m) Sanctions

The Administrator may apply any of the sanctions listed in section 7509(b) of this title at any time (or at any time after) the Administrator makes a finding, disapproval, or determination under paragraphs (1) through (4), respectively, of section 7509(a) of this title in relation to any plan or plan item (as that term is defined by the Administrator) required under this chapter, with respect to any portion of the State the Administrator determines reasonable and appropriate, for the purpose of ensuring that the requirements of this chapter relating to such plan or plan item are met. The Administrator shall, by rule, establish criteria for exercising his authority under the previous sentence with respect to any deficiency referred to in section 7509(a) of this title to ensure that, during the 24-month period following the finding, disapproval, or determination referred to in section 7509(a) of this title, such sanctions are not applied on a statewide basis where one or more political subdivisions covered by the applicable implementation plan are principally responsible for such deficiency.

(n) Savings clauses

(1) Existing plan provisions

Any provision of any applicable implementation plan that was approved or promulgated by the Administrator pursuant to this section as in effect before November 15, 1990, shall remain in effect as part of such applicable implementation plan, except to the extent that a revision to such provision is approved or promulgated by the Administrator pursuant to this chapter.

(2) Attainment dates

For any area not designated nonattainment, any plan or plan revision submitted or required to be submitted by a State—

(A) in response to the promulgation or revision of a national primary ambient air quality standard in effect on November 15, 1990, or

(B) in response to a finding of substantial inadequacy under subsection (a)(2) of this section (as in effect immediately before November 15, 1990),

shall provide for attainment of the national primary ambient air quality standards within 3 years of November 15, 1990, or within 5 years of issuance of such finding of substantial inadequacy, whichever is later.

(3) Retention of construction moratorium in certain areas

In the case of an area to which, immediately before November 15, 1990, the prohibition on construction or modification of major stationary sources prescribed in subsection (a)(2)(I) of this section (as in effect immediately before November 15, 1990) applied by virtue of a finding of the Administrator that the State containing such area had not submitted an implementation plan meeting the requirements of section 7502(b)(6) of this title (relating to establishment of a permit program) (as in effect immediately before November 15, 1990) or 7502(a)(1) of this title (to the extent such requirements relate to provision for attainment of the primary national ambient air quality standard for sulfur oxides by December 31, 1982) as in effect

immediately before November 15, 1990, no major stationary source of the relevant air pollutant or pollutants shall be constructed or modified in such area until the Administrator finds that the plan for such area meets the applicable requirements of section 7502(c)(5) of this title (relating to permit programs) or subpart 5 of part D of this subchapter (relating to attainment of the primary national ambient air quality standard for sulfur dioxide), respectively.

(*o*) Indian tribes

If an Indian tribe submits an implementation plan to the Administrator pursuant to section 7601(d) of this title, the plan shall be reviewed in accordance with the provisions for review set forth in this section for State plans, except as otherwise provided by regulation promulgated pursuant to section 7601(d)(2) of this title. When such plan becomes effective in accordance with the regulations promulgated under section 7601(d) of this title, the plan shall become applicable to all areas (except as expressly provided otherwise in the plan) located within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.

(p) Reports

Any State shall submit, according to such schedule as the Administrator may prescribe, such reports as the Administrator may require relating to emission reductions, vehicle miles traveled, congestion levels, and any other information the Administrator may deem neces-

sary to assess the development[3] effectiveness, need for revision, or implementation of any plan or plan revision required under this chapter.

2. 42 U.S.C. 7607(b) and (d) (2006 & Supp. V 2011) provides:

Administrative proceedings and judicial review

* * * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title,,[3] any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521(b)(1) of this title), any determination under section 7521(b)(5)[1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the

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[3] So in original.

[3] So in original.

[1] See References in Text note below.

Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title, under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial

review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

* * * * *

(d) Rulemaking

(1) This subsection applies to—

(A) the promulgation or revision of any national ambient air quality standard under section 7409 of this title,

(B) the promulgation or revision of an implementation plan by the Administrator under section 7410(c) of this title,

(C) the promulgation or revision of any standard of performance under section 7411 of this title, or emission standard or limitation under section 7412(d) of this title, any standard under section 7412(f) of this title, or any regulation under section 7412(g)(1)(D) and (F) of this title, or any regulation under section 7412(m) or (n) of this title,

(D) the promulgation of any requirement for solid waste combustion under section 7429 of this title,

(E) the promulgation or revision of any regulation pertaining to any fuel or fuel additive under section 7545 of this title,

(F) the promulgation or revision of any aircraft emission standard under section 7571 of this title,

(G) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to control of acid deposition),

(H) promulgation or revision of regulations pertaining to primary nonferrous smelter orders under section 7419 of this title (but not including the granting or denying of any such order),

(I) promulgation or revision of regulations under subchapter VI of this chapter (relating to stratosphere and ozone protection),

(J) promulgation or revision of regulations under part C of subchapter I of this chapter (relating to prevention of significant deterioration of air quality and protection of visibility),

(K) promulgation or revision of regulations under section 7521 of this title and test procedures for new motor vehicles or engines under section 7525 of this title, and the revision of a standard under section 7521(a)(3) of this title,

(L) promulgation or revision of regulations for noncompliance penalties under section 7420 of this title,

(M) promulgation or revision of any regulations promulgated under section 7541 of this title (relating to warranties and compliance by vehicles in actual use),

(N) action of the Administrator under section 7426 of this title (relating to interstate pollution abatement),

(O) the promulgation or revision of any regulation pertaining to consumer and commercial products under section 7511b(e) of this title,

(P) the promulgation or revision of any regulation pertaining to field citations under section 7413(d)(3) of this title,

(Q) the promulgation or revision of any regulation pertaining to urban buses or the clean-fuel vehicle, clean-fuel fleet, and clean fuel programs under part C of subchapter II of this chapter,

(R) the promulgation or revision of any regulation pertaining to nonroad engines or nonroad vehicles under section 7547 of this title,

(S) the promulgation or revision of any regulation relating to motor vehicle compliance program fees under section 7552 of this title,

(T) the promulgation or revision of any regulation under subchapter IV-A of this chapter (relating to acid deposition),

(U) the promulgation or revision of any regulation under section 7511b(f) of this title pertaining to marine vessels, and

(V) such other actions as the Administrator may determine.

The provisions of section 553 through 557 and section 706 of Title 5 shall not, except as expressly provided in this subsection, apply to actions to which this subsec-

tion applies. This subsection shall not apply in the case of any rule or circumstance referred to in subparagraphs (A) or (B) of subsection 553(b) of Title 5.

(2) Not later than the date of proposal of any action to which this subsection applies, the Administrator shall establish a rulemaking docket for such action (hereinafter in this subsection referred to as a "rule"). Whenever a rule applies only within a particular State, a second (identical) docket shall be simultaneously established in the appropriate regional office of the Environmental Protection Agency.

(3) In the case of any rule to which this subsection applies, notice of proposed rulemaking shall be published in the Federal Register, as provided under section 553(b) of Title 5, shall be accompanied by a statement of its basis and purpose and shall specify the period available for public comment (hereinafter referred to as the "comment period"). The notice of proposed rulemaking shall also state the docket number, the location or locations of the docket, and the times it will be open to public inspection. The statement of basis and purpose shall include a summary of—

(A) the factual data on which the proposed rule is based;

(B) the methodology used in obtaining the data and in analyzing the data; and

(C) the major legal interpretations and policy considerations underlying the proposed rule.

The statement shall also set forth or summarize and provide a reference to any pertinent findings, recommendations, and comments by the Scientific Review

Committee established under section 7409(d) of this title and the National Academy of Sciences, and, if the proposal differs in any important respect from any of these recommendations, an explanation of the reasons for such differences. All data, information, and documents referred to in this paragraph on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

(4)(A) The rulemaking docket required under paragraph (2) shall be open for inspection by the public at reasonable times specified in the notice of proposed rulemaking. Any person may copy documents contained in the docket. The Administrator shall provide copying facilities which may be used at the expense of the person seeking copies, but the Administrator may waive or reduce such expenses in such instances as the public interest requires. Any person may request copies by mail if the person pays the expenses, including personnel costs to do the copying.

(B)(i) Promptly upon receipt by the agency, all written comments and documentary information on the proposed rule received from any person for inclusion in the docket during the comment period shall be placed in the docket. The transcript of public hearings, if any, on the proposed rule shall also be included in the docket promptly upon receipt from the person who transcribed such hearings. All documents which become available after the proposed rule has been published and which the Administrator determines are of central relevance to the rulemaking shall be placed in the docket as soon as possible after their availability.

(ii) The drafts of proposed rules submitted by the Administrator to the Office of Management and Budget for any interagency review process prior to proposal of any such rule, all documents accompanying such drafts, and all written comments thereon by other agencies and all written responses to such written comments by the Administrator shall be placed in the docket no later than the date of proposal of the rule. The drafts of the final rule submitted for such review process prior to promulgation and all such written comments thereon, all documents accompanying such drafts, and written responses thereto shall be placed in the docket no later than the date of promulgation.

(5) In promulgating a rule to which this subsection applies (i) the Administrator shall allow any person to submit written comments, data, or documentary information; (ii) the Administrator shall give interested persons an opportunity for the oral presentation of data, views, or arguments, in addition to an opportunity to make written submissions; (iii) a transcript shall be kept of any oral presentation; and (iv) the Administrator shall keep the record of such proceeding open for thirty days after completion of the proceeding to provide an opportunity for submission of rebuttal and supplementary information.

(6)(A) The promulgated rule shall be accompanied by (i) a statement of basis and purpose like that referred to in paragraph (3) with respect to a proposed rule and (ii) an explanation of the reasons for any major changes in the promulgated rule from the proposed rule.

(B) The promulgated rule shall also be accompanied by a response to each of the significant comments,

criticisms, and new data submitted in written or oral presentations during the comment period.

(C) The promulgated rule may not be based (in part or whole) on any information or data which has not been placed in the docket as of the date of such promulgation.

(7)(A) The record for judicial review shall consist exclusively of the material referred to in paragraph (3), clause (i) of paragraph (4)(B), and subparagraphs (A) and (B) of paragraph (6).

(B) Only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment (including any public hearing) may be raised during judicial review. If the person raising an objection can demonstrate to the Administrator that it was impracticable to raise such objection within such time or if the grounds for such objection arose after the period for public comment (but within the time specified for judicial review) and if such objection is of central relevance to the outcome of the rule, the Administrator shall convene a proceeding for reconsideration of the rule and provide the same procedural rights as would have been afforded had the information been available at the time the rule was proposed. If the Administrator refuses to convene such a proceeding, such person may seek review of such refusal in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section). Such reconsideration shall not postpone the effectiveness of the rule. The effectiveness of the rule may be stayed during such reconsideration, however, by the Administrator or the court for a period not to exceed three months.

(8) The sole forum for challenging procedural determinations made by the Administrator under this subsection shall be in the United States court of appeals for the appropriate circuit (as provided in subsection (b) of this section) at the time of the substantive review of the rule. No interlocutory appeals shall be permitted with respect to such procedural determinations. In reviewing alleged procedural errors, the court may invalidate the rule only if the errors were so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made.

(9) In the case of review of any action of the Administrator to which this subsection applies, the court may reverse any such action found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or

(D) without observance of procedure required by law, if (i) such failure to observe such procedure is arbitrary or capricious, (ii) the requirement of paragraph (7)(B) has been met, and (iii) the condition of the last sentence of paragraph (8) is met.

(10) Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a

determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

(11) The requirements of this subsection shall take effect with respect to any rule the proposal of which occurs after ninety days after August 7, 1977.

RESPONDENT'S BRIEF

Nos. 12-1182; 12-1183

Supreme Court, U.S.
FILED
APR 10 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS CALPINE CORPORATION AND EXELON CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Respondents Calpine Corporation and Exelon Corporation adopt and incorporate by reference the Questions Presented as set forth in the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al., and in the Petition For A Writ Of Certiorari Of The American Lung Association, et al.

PARTIES TO THE PROCEEDING

Respondents Calpine Corporation and Exelon Corporation herein adopt by reference the parties to the proceeding listed in the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al.

RULE 29.6 DISCLOSURE STATEMENT

Respondents Calpine Corporation and Exelon Corporation are publicly traded corporations and have no parent companies. No publicly-held company owns 10% or more of their stock.

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Respondents Calpine Corporation and Exelon Corporation respectfully submit this brief in support of the Petition For A Writ Of Certiorari Of The United States Environmental Protection Agency, et al. ("EPA Petition") (No. 12-1182), and the Petition For A Writ Of Certiorari Of The American Lung Association, et al. (No. 12-1183) ("American Lung Ass'n Petition"). Both petitions were docketed on March 29, 2013.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7. The opinion may be found in the Appendix to the EPA Petition (hereinafter "App.") at 1a-116a. The final rule of the EPA at issue in this case (App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (App. 1459a-1462a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS

Pertinent statutory and regulatory provisions are set forth in the appendix to the EPA Petition at 117a-1458a and 1463a-1498a.

STATEMENT OF THE CASE

The petitioners here accurately describe EPA's statutory mandate to address interstate air pollution, the regulatory and judicial history of EPA's several efforts

to fulfill that mandate, including the Transport Rule, and the key errors committed by a divided panel of the court of appeals below in vacating the Transport Rule.[1] Since Congress crafted the "Good Neighbor" provision of the Clean Air Act (the "Act"), 42 U.S.C. § 7410(a)(2)(D), in its current form in 1990, EPA's efforts to address interstate air pollution have focused primarily on the electric power generation industry to which respondents Calpine Corporation and Exelon Corporation belong. Electric generation plants, particularly older coal-fired plants lacking modern pollution controls, are the most significant sources of air pollution that travels across state borders, contributes to poor air quality in downwind areas, and often prevents those areas from meeting or maintaining national ambient air quality standards ("NAAQS") prescribed by EPA to protect public health. In the Transport Rule, EPA determined that pollution from power plants in 27 different states impairs attainment or maintenance of three different NAAQS[2] in 26 areas located in downwind states.

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1. EPA Petition at 2-11 (discussing relevant statutory provisions, the "NO_x SIP Call," Clean Air Interstate Rule ("CAIR") and the Cross-State Air Pollution Rule or Transport Rule, and the three court rulings addressing those efforts, *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 903, 904 (2001) ("*Michigan*"); *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) ("*North Carolina*"); and the decision below in *EME Homer City Generation, LP v. EPA*, 696 F.3d 7 (D.C. Cir. 2012)). Respondents also support and incorporate by reference similar statements set forth in the American Lung Ass'n Petition at 4-16.

2. The specific pollutants addressed by the Transport Rule are nitrogen oxides ("NO_x") and sulfur dioxide ("SO_2") which cause formation of ozone and fine particulate matter ("$PM_{2.5}$") in the atmosphere. The relevant NAAQS are the 1997 $PM_{2.5}$ annual NAAQS, the 2006 $PM_{2.5}$ daily NAAQS and the 1997 8-hour ozone NAAQS. App. 168a.

EPA has been sensitive to how regulation might impact the electric power industry, and has implemented the Good Neighbor provision using the most flexible, cost-sensitive tools that the Act provides. Since 1998, when EPA first issued the rule known as the "NO_x SIP Call," EPA has exercised its authority under the Act to develop market-based programs allowing regulated industries to reduce emissions on an industry-wide level, rather than on a potentially more costly source-specific basis.[3] The NO_x SIP Call, CAIR and the Transport Rule are all such programs in which EPA established a total amount of permissible emissions for each covered state (in tons per year), created an equal number of tradable "allowances," and required each power plant in those states to turn in one allowance for every ton of pollution it emits. The owner of any power plant is free to decide whether to buy allowances from other plants to cover its emissions, or to reduce its emissions (by installing or operating more regularly pollution controls or by reducing operations), enabling it to sell surplus allowances to other plants. *See* EPA Petition at 5 n.3. The electric power industry has uniformly preferred this market-based approach to the alternative: EPA-imposed limits on specific power plants affecting downwind states, or on all power plants, an approach commonly referred to as "command-and-control."

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3. The market-based system adopted in the NO_x SIP Call had its roots in recommendations of the Ozone Transport Assessment Group, comprised of 37 Eastern states. *See* Proposed NO_x SIP Call, 62 Fed. Reg. 60,318, 60,371-72 (Nov. 7, 1997); Supplemental Proposed NO_x SIP Call, 63 Fed. Reg. 25,902, 25,918-23 (May 11, 1998); Final NO_x SIP Call, 63 Fed. Reg. 57,356, 57,457-63 (Oct. 27, 1998).

Industry's preference for market-based emission reduction programs has dovetailed with Congress' plainly expressed intent that market-based regulation be widely deployed in implementing the Act, especially in the electric power sector. Congress amended the Act in 1990 to authorize the use of market-based approaches to achieve NAAQS to promote environmental improvement with maximum economic efficiency. *See* 42 U.S.C. § 7410(a)(2)(A) (providing that state implementation plans ("SIPs") can include "economic incentives" such as "marketable permits" to meet NAAQS); *id.* at § 7602(y) (defining "Federal implementation plan" ("FIP") to include economic incentives "such as marketable permits or auctions of emissions allowances" in order to achieve NAAQS); *see also* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399 (1990). Congress also amended the Good Neighbor provision in 1990 to allow more implementation flexibility by addressing cumulative emissions from multiple sources rather than emissions from single stationary sources, EPA Petition at 3-4, thereby encouraging market-based approaches that can control multiple sources at lowest cost. The Congressional preference for market-based solutions in the electric power industry is also reflected in the Title IV Acid Rain Program, which recognized the peculiar suitability of interstate market-based systems for addressing pollution from power plants by creating a statutory market-based program for reducing SO_2 emissions. *See* 42 U.S.C. §§ 7651-7651o.[4]

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4. This Congressional preference was reinforced by President George H.W. Bush, who remarked on signing the 1990 amendments to the Act:

> The innovative use of market incentives in the bill represents the turning of a new page in our approach to environmental problems in this country. . . .

Indeed, the vexing and persistent problem of interstate transport of air pollution from the utility industry demands such an interstate approach, and in particular the sort of market-based approach both authorized and encouraged by Congress in the Act. Given the interconnected nature of wholesale electricity markets, when one state imposes strict emissions limits on power plants, electric generation will shift to plants in other states with less stringent requirements and therefore lower costs. These higher-emitting plants will simply export electricity into the controlled state and emit as much or even more pollution, which will be carried in the atmosphere to many downwind states. Without either a uniform command-and-control system which requires all power plants to install and operate the same controls or a market-based system that compensates for shifting generation patterns, pollution controlled in one state will simply be displaced to another, and could increase overall.

While EPA's earlier market-based programs provided important reductions in interstate pollution, they were not sufficient to address the increasing amount of interstate

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> By employing a system that generates the most environmental protection for every dollar spent, the trading system lays the groundwork for a new era of smarter government regulation; one that is more compatible with economic growth than using only the command and control approaches of the past.... The result will be the dawning of a new era in regulatory policy, one that relies on the market to reconcile the environment and the economy.

President's Statement on Signing of S. 1630, the Amendments to the Clean Air Act (Nov. 15, 1990), *reprinted in* 1 S. Comm. on Environment & Public Works, *A Legislative History of the Clean Air Amendments of 1990* at 727 (1998).

air pollution, nor did they keep pace with NAAQS that grew more stringent over time. As EPA's implementation of the Good Neighbor provision has evolved from the NO_x SIP Call through CAIR to the Transport Rule, EPA has established a clear methodology and trajectory that it considers necessary for more effective regulation of interstate pollution from power plants: EPA has pursued a market-based approach to regulation; the agency has expanded the scope of regulation as necessary to include additional states that fail to comply with the Good Neighbor provision; and the agency has required greater emissions reductions over time when necessary to achieve increasingly stringent NAAQS. The power industry has been well-aware of this path, and because the Act establishes deadlines for states to comply with NAAQS, a fact emphasized by the court of appeals in *North Carolina*, 531 F.3d at 912, the industry also has been well-aware of the *timing* when such additional reductions would be necessary.

Calpine Corporation, Exelon Corporation and many other power generators relied on the provisions of the Act, as interpreted by EPA for more than a decade, and on the decisions of the court of appeals in *Michigan* and *North Carolina*, and prepared for inevitable future constraints on emissions by investing in and operating modern electric generating units which emit little or no air pollution, including combined-cycle natural gas, nuclear, alternative energy and coal-fired units with state-of-the-art pollution control technologies. In contrast, other generators chose to delay such investments, hoping that new control costs could be avoided for as long as possible.

Respondents intervened in the proceedings below to support the Transport Rule because it provides the most cost-effective method to mitigate interstate pollution. The Rule employs a market-based approach ensuring that sources can make the necessary reductions through either operation of available control technologies or purchasing allowances from other sources, whichever is more cost-effective. All the industry parties to this proceeding have supported such a market-based approach to interstate pollution rather than a more costly and less flexible command-and-control approach.[5]

The court of appeals' decision, however, established new, non-statutory constraints on EPA's implementation of the Good Neighbor provision which renders such a market-based approach impossible. The decision forbids EPA to impose state budgets that (1) reduce any state's downwind impact to a level below the screening threshold for potential inclusion in the Transport Rule ("Threshold Constraint"); (2) require any state to reduce emissions except in proportion to the contributions of other upwind states ("Proportionality Constraint"); or (3) cause the cumulative reductions from all upwind states to reduce pollutants present in a downwind state to a level below the

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5. When proposing the Transport Rule, EPA solicited comment on several alternatives to the market-based approach, including a command-and-control approach. No electric industry member commented in favor of the command-and-control approach. *See* Transport Rule Primary Response to Comments, 1554-1562 (June 2011), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4513 ("Response to Comments"). *See also, id.* at 883-889. The Response to Comments was part of the administrative record for the Rule. *See also* App. 430a-431a.

NAAQS ("Over-control Constraint"). *See* App. 22a-25a, 31a-41a. These constraints cripple EPA's ability to design a cost-effective, market-based program to address interstate air pollution through the Good Neighbor provision. The court of appeals effectively abrogated those provisions of the Act that authorize and encourage EPA to adopt market-based solutions.

Moreover, by imposing these constraints, the court of appeals conflicts with its prior decisions in *Michigan* and *North Carolina* which acknowledged the propriety of EPA's methodology in determining upwind states' "significant contributions" to downwind states and in using market-based trading programs to satisfy the Act's Good Neighbor provision. As a result, where states fail to comply with the Good Neighbor provision, EPA can correct this failure, if at all, only with costly, inflexible command-and-control requirements on the electric generation industry, frustrating the will of Congress and injuring industry while serving no environmental or public health goal.

REASONS FOR GRANTING THE PETITIONS

The split decision below represents a classic case of a court overstepping its authority and imposing its own policy determinations on complex technical issues with disastrous results. The court of appeals did not merely test the boundaries of its authority under the Act, it took a running start and leaped over the high walls erected by this Court in *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984) and its progeny, walls rooted in the Constitutional doctrine of the separation of powers. The court of appeals not only usurped the role reserved to the

Executive Branch, it ventured far beyond the realm of judicial competence and took upon itself the role of expert agency, reducing extremely complicated technical issues to over-simplified hypotheticals that collapse when tested against reality. The court of appeals' decision conflicts with prior rulings of the same court on the same statutory provision, and its encroachment on the exclusive province of EPA has led to substantial legal and factual errors and unworkable extra-statutory constraints on EPA's authority to implement the Good Neighbor provision.

The majority's assumption of EPA's role as expert administrative agency in a highly complex area frustrates effective implementation of the Act and, hence, Congressional intent. Congress required states to address the complex problem of interstate transport and mandated that EPA step in when states failed to do so, arming EPA with the power to impose the same type of market-based program that Congress developed for the electric power industry to address interstate pollution causing acid rain. The constraints created *sua sponte* by the court of appeals effectively prohibit the administrative agency from fulfilling this mandate. The court of appeals reached its decision on these constraints by considering a statutory argument never presented to the expert agency during the public comment period and created its own interpretation of a statutory term that the same court had previously found to be ambiguous. These departures from the accepted and usual course of judicial proceedings merit this Court's review.

The Court should grant review because of the importance of the issues implicated in this case. Ironically invoking the label of "cooperative federalism," the court

of appeals has deprived the many downwind states that looked to the Transport Rule to resolve disputes with their upwind neighbors of the only comprehensive remedy provided by the Act to address interstate air pollution. This case involves at its core the duties of upwind states to control pollution that harms downwind states. Had the states appearing in this action sought common law remedies against one another, the resulting cases would be before this Court as a matter of its original jurisdiction.[6] *See* U.S. Const. art. III, § 2; 28 U.S.C. § 1251. *See also, New York v. New Jersey*, 256 U.S. 296, 301-302 (1921) (suit by New York to enjoin New Jersey from diverting sewage to New York Harbor); *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907) (suit by Georgia to enjoin air pollution from facilities in Tennessee).

Hence, while millions of Americans are exposed to unhealthy levels of air pollution that their state governments are powerless to prevent, the court of appeals not only vacated the Transport Rule but also imposed judge-made constraints on EPA that will defer any remedy for years to come. Those constraints will harm the critically important electric power industry (including many of the petitioners below) by forcing EPA to abandon the market-based programs preferred by Congress and employed for over twenty years, and to fulfill its statutory mandate through a costly, inflexible command-and-control approach. It is not for the court of appeals to impose such devastating paradigm changes in

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6. It is for this reason, among others, that nine states, the District of Columbia, and several large cities intervened in the case below to support the Transport Rule and are now supporting the petitions as well. *See Brief for the Respondent States and Cities in Support of Petitioners*, filed April 18, 2013.

long-standing administrative programs, particularly when the same court has previously upheld the very elements of those programs that it now rejects. Unless this Court exercises its supervisory powers to review the case and correct the majority's errors, EPA, the electric power industry, disadvantaged downwind states and millions of endangered American citizens will have to cope with their consequences for years to come.

A. FAILING TO OBSERVE THE PROSCRIPTIONS OF *CHEVRON*, THE COURT OF APPEALS CREATED AND IMPOSED UNREASONABLE LIMITATIONS UPON EPA'S AUTHORITY, IN CONFLICT WITH EPA'S REASONABLE INTERPRETATION OF THE ACT.

In *Chevron*, this Court clearly defined the duty of the court of appeals in reviewing EPA regulations in a highly complex area, mandating judicial deference to regulatory determinations based on a permissible construction of the statute. This Court explained that deference was founded upon well-established principles relating to the relative competencies of judges and expert administrative agencies and Constitutional principles of separation of powers:

> [C]onsiderable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations "has been consistently followed by this Court whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full

> understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations." [Citations and footnote omitted.]
>
> . . . "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."

Chevron, 467 U.S. at 844-45, *citing United States v. Shimer*, 367 U.S. 374, 382-383 (1961). The court of appeals failed faithfully to apply the *Chevron* analysis.

1. The court of appeals ignored its own precedent that found the Good Neighbor provision ambiguous.

In *Michigan*, the court of appeals determined that the Good Neighbor provision, specifically the term "contribute significantly" as used in that provision, is undefined in the Act and ambiguous. *Michigan*, 213 F.3d at 674, 677-679. The court found that the language of the statute did not unambiguously conflict with EPA's two-step approach for determining, first, which states contribute significantly to downwind nonattainment, and second, the amount of that contribution. *Id.* at 677-680 (upholding EPA's two-step analysis as a reasonable "two-dimensional" approach). In *North Carolina*, the court again declined to disturb EPA's use of the same two-step approach. *See North*

Carolina, 531 F.3d at 916-917. Because the *Michigan* court found the term to be ambiguous, *Chevron* required the court of appeals to afford EPA substantial discretion to interpret the critical statutory term "contribute significantly." *Michigan*, 213 F.3d at 677-679 (deferring to EPA's determination of that term based on highly cost-effective pollution controls). *See also Chevron*, 467 U.S. at 843; EPA Petition at 21-24.

Rather than beginning with its own finding in *Michigan* that the Good Neighbor provision is ambiguous and deferring to EPA's expertise, the court of appeals, like the panel overturned in *Chevron*, developed its own interpretation of the Act, unmoored from legislative intent or agency expertise, and imposed constraints it declared to be unambiguously required by the statute. *See* App. 23a-25a; *see also id.* at 114a (the majority "proceeds to do violence to the plain text of the CAA and EPA's permissible interpretations of the CAA.") (Rogers, J., dissenting).

The "red lines" created by the court of appeals on the Threshold, Proportionality and Over-control Constraints, *see id.* at 22a-25a, appear nowhere in the statute. They also directly conflict with the court's prior rulings. As noted above, *Michigan* approved, and *North Carolina* did not disturb, EPA's same two-step method. Both courts expressly allowed EPA to determine "contribute significantly" without a proportionality test. *See North Carolina*, 531 F.3d at 908 (finding EPA's determination of significant contribution need not "directly correlate with each state's individualized air quality impact on downwind nonattainment relative to other upwind states"); *Michigan*, 213 F.3d at 679 (acknowledging that

EPA determination of "contribute significantly" could result in small contributors making reductions equivalent to higher emitting states); *see* App. 67a-69a, 102a-103a, 112a (Rogers, J., dissenting).

Nowhere did the court of appeals even acknowledge overruling *Michigan* and *North Carolina* on these points, much less provide a reasoned basis for doing so. Nor did the majority explain how it conjured its three very specific constraints from the notoriously unspecific Good Neighbor provision that it had previously found to be undefined and ambiguous. Nonetheless, by reversing itself and declaring, however obliquely, that the Act unambiguously imposes these three constraints, the court of appeals absolved itself from its responsibility to ask the next question required by *Chevron*: Is EPA's interpretation reasonable?

2. The court of appeals failed to defer to the agency's reasonable interpretation of ambiguous statutory terms in a highly technical area.

Had the court of appeals followed the dictates of *Chevron*, it would have concluded that EPA's interpretation of the Good Neighbor provision was certainly reasonable. The problem of interstate air pollution is overwhelmingly complex. Such pollution does not simply arise from one or more sources contributing consistently proportional and large amounts of emissions to a single downwind state as the court of appeals suggests with its oversimplified hypotheticals. *See* App. 26a-29a. Rather, interstate pollution is a complex phenomenon where multiple upwind states can have multiple and varying impacts on multiple downwind states (which themselves may also be upwind

states), where small amounts from various upwind states can combine to have large collective impacts on more than one downwind state, and where states themselves may have widely varying control requirements such that costs of generation and control vary from state to state. *See* EPA Petition at 7-9, 21-28; *see infra*, 19-24.

These factors all point toward an interstate market-based solution that seeks to quantify these collective impacts by states, determine what controls and costs are required to reduce them, and then allow the required emissions reductions to be made in the most cost-effective manner to sources – either by operating controls or by purchasing allowances. That is the precise solution EPA developed in the Transport Rule.

Had the court of appeals properly considered EPA's informed administrative judgment, it would have given greater weight, for example, to the fact that EPA considered a proportionality requirement in the rulemaking similar to that ultimately imposed by judicial fiat, but concluded in its expert judgment that such a requirement would be neither feasible nor cost-effective. Rather, the court of appeals only briefly referred to this important fact in a footnote, without explaining why EPA's conclusion was not reasonable. *See* App. 40a n.24 (citing EPA, Alternative Significant Contribution Approaches Evaluated Technical Support Document (July 2010), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-0077 (JA02311-12)). Nor was the court of appeals' imposition of the Over-control Constraint based on impermissible EPA interpretations. Neither the court of appeals nor any party identified any scenarios where the Transport Rule would create over-control. *See* App. 114a (recognizing that

instances of over-control were unsupported by the record) (Rogers, J., dissenting). Indeed, EPA had observed that even full implementation of the Transport Rule would still not ensure all downwind states could attain NAAQS. App. 130a, 232a, 311a-316a. With regard to the Threshold Constraint, the court of appeals disregarded EPA's explanation of how and why it used an air quality-based estimate of impacts (1% of NAAQS) only as a threshold first-step "Screening Analysis" for determining which states would potentially be subject to the Transport Rule. *See* EPA Petition at 6-7. Instead, the court of appeals held EPA's threshold to be a "floor" that prevented regulation of contributions to downwind states below 1%. Yet, as Judge Rogers noted in her dissent, the court of appeals' concern that a state may be required to reduce more than its threshold amount was based solely on a hypothetical and not on reality. App. 95a n.15 (Rogers, J., dissenting). The majority disregarded all these analyses and agency rationales, preferring to establish its own determination of what Congress intended "contribute significantly" to mean.[7] *Cf. Chevron,* 467 U.S. at 863-66.

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7. The majority's errors might have been avoided had the statutory construction argument and the hypotheticals adopted by the court been presented to EPA during public comments so that EPA could address the issues expressly, as required by the Act. Instead, the court failed to recognize statutory limits on its jurisdiction that permit it to consider "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment," 42 U.S.C. § 7607(d)(7)(B), so as to give the expert agency the opportunity to respond and provide a basis for judicial review under the applicable arbitrary and capricious standard, *id.* § 7607(d)(9)(A). *See* App. 95a-110a (Rogers, J., dissenting). *See also* EPA Petition at 18-21; American Lung Ass'n Petition at 16-20.

Had the court of appeals properly fulfilled the role set out for it by this Court in *Chevron* or followed its own prior rulings, the court of appeals would have inevitably concluded that EPA's interpretation and implementation of the Good Neighbor provision were reasonable, regardless of whether the judges would have preferred that EPA create a floor for reductions, or establish a proportionality requirement, or more rigorously avoid "over-control." *See Am. Elec. Power Co. Inc., et al. v. Connecticut, et al.*, 131 S. Ct. 2527, 2539 (2011) (on complex scientific and technical matters, EPA is the "first decider" in the case and the courts the second); *Chevron*, 467 U.S. at 843 (court should not "impose[] its own construction on the statute."). EPA properly relied on *Michigan* and *North Carolina* for guidance in developing the Transport Rule and its predecessor, CAIR. *See* App. 65a (EPA was entitled to rely on prior precedent that the majority "trampled") (Rogers, J., dissenting). In light of the majority's radical departure from settled law, this Court should review the court of appeals' decision to remove the constraints imposed by the majority on EPA's ability to interpret and implement the Good Neighbor provision.

B. THE MAJORITY'S JUDGE-MADE CONSTRAINTS ABROGATE EPA'S STATUTORY AUTHORITY TO IMPLEMENT MARKET-BASED EMISSION CONTROL PROGRAMS.

The Court should also review this petition because the court of appeals committed a cascade of technical errors when it departed from its proper limited role in overseeing expert agency decisions. By injecting its own policy decisions and technical analysis, the court of appeals directly contradicted this Court's instruction in

American Electric Power Co., Inc., that EPA, not the courts, is in the best position to undertake the complex balancing of policy and science that is essential to the implementation of the Act:

> It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions.... Federal judges lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order. *See generally* [*Chevron*, 467 U. S. at 865-866]. Judges may not commission scientific studies or convene groups of experts for advice, or issue rules under notice-and-comment procedures inviting input by any interested person, or seek the counsel of regulators in the States where the defendants are located.

Am. Elec. Power Co. Inc., 131 S. Ct. at 2539-2540. The court of appeals' failure to confine itself to the role established by Congress and this Court yielded technical errors which render it impossible for EPA, the expert agency chosen by Congress, to implement the Act in harmony with clear Congressional intent.

1. The court of appeals imposed constraints on EPA that cannot be met.

EPA's petition accurately explains why the agency's market-based approach is the most reasonable, cost-effective and lawful response to the technically complex problem of interstate pollution. EPA Petition at 7-9, 21-28. Lacking EPA's expertise and resources, the

court of appeals invented constraints which effectively prohibit EPA from taking such an approach to fulfill its Congressional mandate to address interstate pollution transport when states fail to act. The majority's Threshold, Proportionality, and Over-control Constraints cannot possibly be met simultaneously in the real world, as the examples below plainly demonstrate.

Threshold Constraint. The Threshold Constraint – forbidding a state to be required to reduce its contributions below 1% of the NAAQS – ignores the reality that many upwind states contribute small amounts of pollution to multiple downwind states. In its first-step Screening Analysis, EPA identified states that contribute to at least 1% of a NAAQS at any point where a downwind state fails to achieve NAAQS, or where long-term NAAQS compliance is at risk, so as to screen out the states that do not meet this threshold anywhere.

For example, EPA identified 21 states that contribute more than 0.35 $\mu g/m^3$ to eight downwind states where $PM_{2.5}$ concentrations exceed the 24-hour $PM_{2.5}$ NAAQS of 35 $\mu g/m^3$. *See* EPA's *Air Quality Modeling Final Rule Technical Support Document*, Appendix D-11 to D-12 (2011) (JA02710-11), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4140 ("Air Quality TSD"), which was part of the administrative record for the Transport Rule. Each of these 21 states contributes different amounts to each nonattainment area. Maryland, for example, contributes barely over 1% of the NAAQS (0.36 $\mu g/m^3$) to the nonattainment area in Cuyahoga County, OH, but contributes over 8% of the NAAQS (2.84 $\mu g/m^3$) to the one in Lancaster County, PA. *Id.* If EPA required even modest reductions by Maryland

to halve its contribution to Lancaster County, Maryland's contribution to Cuyahoga County would certainly be reduced below the 1% floor, in violation of the court of appeals' Threshold Constraint. *See* App. 34a-38a.

Theoretically, EPA might be able to satisfy the majority's Threshold Constraint, reducing Maryland's contribution to Lancaster County without materially reducing Maryland's contribution to Cuyahoga County, by imposing limits on specific power plants in Maryland, provided that different Maryland facilities affect the two nonattainment areas.[8] However, the majority also held that EPA lacks authority to prescribe individual facility limits in the first instance, and must initially go no farther than giving states emission budgets to incorporate into their SIPs. App. 42a-45a. With no more refined tool at its disposal than its budget-fixing power, EPA cannot honor the Threshold Constraint while assuring that each upwind state's maximum contribution is reduced to the extent required by the Act.

Proportionality Constraint. The court's Proportionality Constraint – emission budgets must "be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment" – is also impossible to accommodate. *See* App. 25a. The court's examples to "illustrate the point" are oversimplified and mistakenly assume that

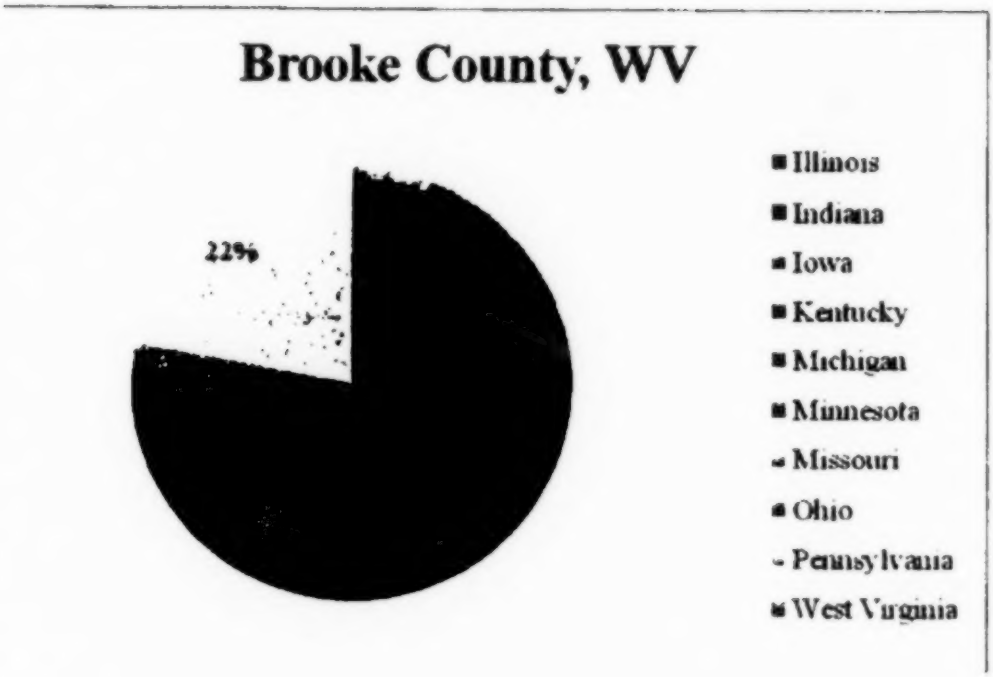
---

8. EPA proposed such an alternative, *see* Proposed Transport Rule, 75 Fed. Reg. 45,210, 45,330 (Aug. 2, 2010), but it was universally rejected by industry (*see* Response to Comments at 1554-1562), and undermined the goals of economic efficiency for which market-based control systems were authorized in the Act. 75 Fed. Reg. at 45,333.

a group of states could contribute to a single downwind nonattainment area rather than multiple areas. App. 26a. Contrary to the court's examples, each nonattainment area is affected by multiple upwind states, most of which also contribute to other areas in differing proportions. If EPA meets the court's Proportionality Constraint for one nonattainment area, it will necessarily run afoul of this requirement at every other area. *See* EPA Petition at 22-24; American Lung Ass'n Petition at 25-28.

For example, the Milwaukee, WI nonattainment area receives contributions from 27 states, ten of which contribute more than 1% of the 24-hour $PM_{2.5}$ NAAQS. *See* Air Quality TSD, Appendix D-11 to D-12. The Brooke County, WV nonattainment area receives contributions from 30 upwind states, six of which exceed the 1% threshold. *Id.* Indiana (23%) and Illinois (24%) contribute roughly equal amounts to Milwaukee, while Ohio (15%) contributes less. To follow the court's directive, EPA would have to develop budgets for Indiana and Illinois that reduce contributions to Milwaukee by about the same amount, and a budget for Ohio requiring smaller reductions. The majority would also require that EPA's budgets reduce proportionately those states' contributions to Brooke County. However, Ohio (45%), Indiana (13%) and Illinois (6%) contribute to nonattainment in Brooke County in dramatically different proportions. Figure 1, derived from data in EPA's Air Quality TSD, Appendix D-11 to D-12, illustrates that the majority mandates what is mathematically impossible: that EPA devise budgets for Illinois, Indiana and Ohio that are both in a ratio of 5:5:3 and in a ratio of 1:2:6. This example is typical of the problem of interstate pollution transport.

FIGURE 1


Brooke County, WV
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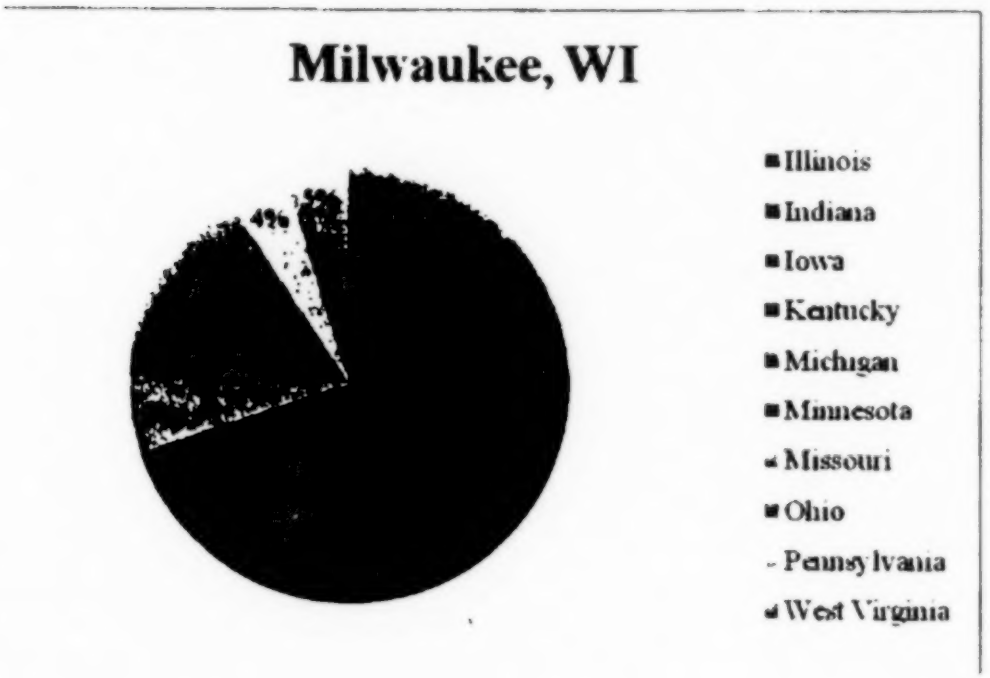
Milwaukee, WI
49%
Illinois
Indiana
Iowa
Kentucky
Michigan
Minnesota
Missouri
Ohio
Pennsylvania
West Virginia

The majority's acknowledgement that *complete* proportionality might not *always* be possible, and that EPA has some discretion in this regard, does not solve the unsolvable mathematical problem that the majority has imposed on EPA. *See* App. 29a. The majority certainly did not accord EPA any such discretion when reviewing EPA's determination of significant contribution, and failed even to discuss the agency's rationale for considering but rejecting a proportionality criteria in the rulemaking process. Further, the court's acknowledgement that some disproportionality may be unavoidable gives the agency no helpful guidance on how and when it can determine it is not technically feasible to observe the majority's Proportionality Constraint.

Over-control Constraint. It is also practically impossible for EPA to fulfill the court of appeals' Over-control Constraint – state budgets must "not produce more than necessary 'over-control' in the downwind States" (App. 27a) particularly when combined with the Threshold and Proportionality Constraints. Ohio contributes to five Pennsylvania nonattainment areas, at four of which (in Allegheny and Beaver Counties) Ohio is the largest upwind influence, contributing, on average, 11% of the NAAQS. *See* Air Quality TSD, Appendix D-11 to D-12. For Lancaster County, however, Ohio's contribution is relatively small, representing one-tenth of all upwind contributions, and just one-quarter of Maryland's contribution. *See supra*, 19-20. Yet, Maryland does not contribute above 1% in Allegheny and Beaver Counties. EPA cannot develop a budget for Ohio to eliminate its high contribution to Allegheny and Beaver Counties without also reducing Ohio's impact on Lancaster County far below the 1% floor created by the court of appeals. If the cumulative effect

of EPA's budgets for the seven states contributing to Lancaster County resulted in "over-control," the majority would require a proportional increase of state budgets for all seven contributors, App. 28a n.16, which would necessarily result in increases in Ohio's contribution to all Pennsylvania counties, including one that would not achieve attainment even under full implementation of the Rule. *See* Air Quality TSD, Appendix B-85 (Allegheny County receptor 420030064 projected to exceed NAAQS by 29% after implementation of the Transport Rule) (JA02630). The Threshold, Proportionality, and Over-control Constraints invented by the majority cannot be achieved in the real world.

2. The court of appeals' extra-statutory constraints bar EPA from addressing interstate pollution with a market-based system.

Even assuming that the court's three constraints could theoretically be met, these requirements effectively bar EPA from utilizing any market-based system to address interstate pollution from the electric power industry, contrary to clear expressions of Congressional intent. As noted above, Congress determined market-based programs to be the most appropriate method for addressing the problem of interstate air pollution from the power industry when it created the Title IV Acid Rain Program and specifically authorized the use of market-based approaches under Title I of the Act to achieve and maintain compliance with NAAQS because market-based programs promote environmental improvement with maximum economic efficiency. *See supra*, 4. *See also* Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers And*

What Should be Done About It (Yale University Press 1981).

In light of this clear Congressional preference for use of market-based systems, in the Transport Rule, as in CAIR and the NO_x SIP Call, EPA adopted an allowance trading program that allows the market to dictate where emission reductions will occur at the lowest cost. *See* EPA Petition at 5 n.3. Industry uniformly favors such systems due to their economic efficiency and flexibility, as compared to more expensive command-and-control approaches. Both supporters and detractors of the Transport Rule supported it's market-based approach, and urged EPA not to adopt direct controls. *See supra*, note 5.

The Transport Rule was designed specifically for the electric generation industry, and to accommodate the competitive wholesale electricity markets that predominate in the states affected by the Transport Rule. There are two basic principles underlying these markets. First, owners of generation units typically offer their available generation capacity to the regional transmission organization at a price equal to or just above their operating costs. As electricity demand fluctuates, the regional transmission organization will activate or "dispatch" generation capacity beginning with the lowest bidder, and will add capacity with higher bids until demand is met. Second, all generators are paid the same price as the highest bidder whose generation capacity is necessary to meet demand. These principles have significant implications for interstate pollution transport.

Emission controls increase the operating cost of a power plant. With higher operating costs, a plant may be dispatched less, sell less electricity and sell its electricity

for a smaller profit than a plant without emission controls. If these operating costs are offset by the value of allowances that can be sold, it is in the owner's economic interest to operate the emission controls. If the costs are not offset, the control equipment is not used, except as necessary to achieve permit limits.

The Transport Rule uses the electricity market's structure to reduce emissions by limiting the number of available allowances, causing allowance prices to increase until the price justifies operation of emission controls. Emission reductions come from switching electric generation either to units using cleaner technologies or to those that have and operate pollution controls. For units that have controls, the cost of operating those controls to achieve reductions is offset by the sale of surplus allowances to units that operate without controls. The allowance cost will be incorporated into the operating costs of the uncontrolled unit, raising its minimum bid price into the wholesale electricity market. As the number of allowances is reduced and prices increase, the minimum bid of uncontrolled units may become so high that the units with no controls are dispatched less frequently, and cleaner units are dispatched more frequently. This effect reduces pollution further.

EPA cannot implement a state budget-based market system if it lacks either the data or the tools to predict that the market will produce reductions that actually "achieve something measurable" in response to those budgets. *North Carolina*, 531 F.3d at 907-908. EPA used sophisticated models to derive state budgets based on a given fixed cost to control emissions (in dollars per ton removed). In developing emission budgets, EPA used both

air pollution transport model and an electric industry economic model to evaluate how pollution control costs would shift generation among power plants, and how downwind air quality would be affected by these shifts. These models allowed EPA to evaluate how emissions would change if, for example, generation units were required to incur an additional $500 in costs for each ton of NO_x or SO_2 emitted. EPA used existing data to predict how individual sources within each state would respond to a certain fixed cost (yielding the state budgets), and how the resulting change in emission patterns would affect downwind pollution (eliminating most upwind contributions to nonattainment and maintenance).

The court of appeals discarded without discussion EPA's complex technical analysis which incorporated economics, market structure and atmospheric pollutant transport modeling, and instead substituted its own judgment, based primarily on oversimplified and unrealistic hypotheticals. In order to satisfy the Threshold, Proportionality and Over-control Constraints, assuming that it is theoretically possible to do so at all, EPA would have to incrementally adjust each state's budget by adjusting the control cost used for each state. Thus, while EPA used a control cost of $500 per ton of emissions as a starting point in all states, EPA would need to use a lower control cost in some states (increasing their budgets) to attempt to tune each state's budget to comply with the majority's three constraints. Notably, the majority would prohibit EPA from tuning in the other direction, using higher control costs in certain states, resulting in more restrictive budgets. App. 11a.

Such an approach based on different control costs for each state effectively prohibits a market-based program

relying on *interstate* allowance trading, like the Transport Rule and all of its predecessors. Electric generation is fluid. If control costs are higher in State A than in State B, generation will shift from State A to State B, increasing emissions in State B to levels above its budget. If EPA cannot ensure that State B will stay within its budget, EPA cannot predict whether its downwind impact will be eliminated. When EPA used different SO_2 control costs in two groups of states, it needed to bar trading between those groups of Transport Rule states to ensure that emission reductions occur in the states where they are needed. Likewise, if EPA were to use different cost figures for each state to achieve the court of appeals' constraints, interstate trading would also have to be prohibited.[9]

The court of appeals thus effectively stripped EPA of the primary tool that the agency has used to address the "intractable" problem of interstate air pollution. The court of appeals found in *Michigan* that EPA's interpretation of the Good Neighbor provision is reasonable, and neither the Act nor *Michigan* nor *North Carolina*, nor any other authority suggests that EPA fundamentally erred in choosing the Transport Rule's system as a remedy. While the court characterized its holdings as extensions or clarifications of these earlier decisions, the practical consequences of its holdings are entirely inconsistent with the Act and with the D.C. Circuit's prior endorsement of EPA's fundamental market-based approach.

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9. EPA considered an alternative without interstate trading in developing the Transport Rule, but industry uniformly opposed that alternative and EPA rejected it for technical reasons. *See, e.g.*, Response to Comments at 883-889; App. 430a-431a.

3. If allowed to stand, the court of appeals' decision will have far-reaching effects.

If left standing, the constraints imposed by the majority in this case will impede EPA's future efforts to utilize market-based approaches to ensure states meet NAAQS not at issue in this case, including more recently revised standards for $PM_{2.5}$ and for other pollutants. *See, e.g.*, 78 Fed. Reg. 3086 (Jan. 15, 2013) (strengthening the annual $PM_{2.5}$ NAAQS from 15 $\mu g/m^3$ to 12 $\mu g/m^3$). EPA had intended the Transport Rule to serve as a model for enforcement of additional NAAQS, EPA Petition at 12, 31-32, and if the court of appeals' extra-statutory constraints are allowed to stand, EPA will not be able to use this model.[10] Moreover, the invalidation of the Transport Rule on the basis of judicial policy choices unmoored from the language of the Act creates great uncertainty about related regulations by EPA under the Act. *See id.* at 12, 30-32. Regulatory uncertainty poses a major problem for the electric generating industry, where companies must make large capital investments and strategic decisions far in advance, in anticipation of rules that may apply in the future. The court of appeals' injection of its own policy preferences, devoid of statutory basis or *Chevron* deference, creates a particularly high

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10. EPA does not go as far as to say it can never develop a regulatory system to address the Good Neighbor provision, carefully stating that the court of appeals' unwarranted constraints "*may* leave the EPA enough latitude to at least *attempt* to craft a new regulatory approach that meets the court's requirements." EPA Petition at 30 (emphasis added). However, EPA further notes that without the ability to consider costs or collective contributions, EPA may be forced to adopt a rule that is less flexible and more burdensome on some states. *Id.*

level of uncertainty that should and need not exist. This Court's review is necessary to remove this uncertainty from the marketplace and to restore the latitude granted by Congress to EPA. This latitude is necessary for EPA to fulfill its mandate to ensure that downwind states and their residents are not endangered by upwind states that succumb to parochial economic interests, disregarding their wider responsibilities in our federal system.

CONCLUSION

The petitions for writs of certiorari in No. 12-1182 and No. 12-1183 should be granted.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

SUPREME COURT, U.S.
FILED
SEP - 4 2013
OFFICE OF THE CLERK

Nos. 12-1182; 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF RESPONDENTS CALPINE CORPORATION AND EXELON CORPORATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, requires the United States Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards ("NAAQS") for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. §§ 7408, 7409. "[W]ithin 3 years" of "promulgation of a [NAAQS]," each State must adopt a state implementation plan ("SIP") with "adequate provisions" that will, *inter alia*, "prohibit [ ]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the NAAQS. 42 U.S.C. § 7410(a)(1), (2)(D)(i)(I). If a State fails to submit a SIP or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C § 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. § 7410(c)(1).

The questions presented are as follows:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

2. Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective

emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

PARTIES TO THE PROCEEDING

Respondents Calpine Corporation and Exelon Corporation herein adopt by reference the parties to the proceeding listed in the briefs of Petitioners United States Environmental Protection Agency and the American Lung Association, *et al.*

RULE 29.6 DISCLOSURE STATEMENT

Respondents Calpine Corporation and Exelon Corporation are publicly traded corporations and have no parent companies. No publicly-held company owns 10% or more of their stock.

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Respondents Calpine Corporation and Exelon Corporation respectfully submit this brief in support of Petitioners United States Environmental Protection Agency, *et. al.* ("EPA") and American Lung Association, *et al.*

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 696 F.3d 7. The opinion may be found in the Appendix to EPA's petition for certiorari (hereinafter "App.") at 1a-116a. The final rule of the EPA at issue in this case (App. 117a-1458a) is reported at 76 Fed. Reg. 48,208.

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (App. 1459a-1462a). Petitions for certiorari were filed on March 29, 2013, and the Court granted certiorari on June 24, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATORY PROVISIONS

The relevant statutes and regulatory provisions are set forth by Petitioners in their briefs and in the Appendix at 117a-1458a and 1463a-1498a.

STATEMENT OF THE CASE

I. INTRODUCTION

Respondents Calpine Corporation and Exelon Corporation submit this brief in support of Petitioners and the Cross-State Air Pollution Rule, commonly referred to as the Transport Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011) (App. 117a-1458a). Respondents are members of the electric generation industry which is regulated by the Rule, own power plants covered by the Rule and have a direct and compelling interest in cost-effective solutions to interstate air pollution.[1] Respondents specifically address only the third Question Presented by EPA in its petition for certiorari: whether EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind state's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether EPA must meet a far more restrictive set of limits imposed by the majority in the court of appeals decision below.[2]

---

1. Respondents Calpine Corporation and Exelon Corporation own generation capacity of over 63,000 MW, enough to serve over 63 million households. Respondents' generation fleets are comprised primarily of gas-fired, nuclear and other electric generating units emitting far less pollution than uncontrolled coal-fired units.

2. Respondents support Petitioners and Respondent States and Municipalities in support of Petitioners with respect to their arguments regarding the other Questions Presented by EPA related to jurisdiction to hear certain challenges to the Transport Rule and EPA's issuance of a federal implementation plan.

The Clean Air Act ("Act"), 42 U.S.C. § 7401 *et seq.*, and its Good Neighbor Provision, *id.* § 7410(a)(2)(D)(i), afford EPA substantial discretion in formulating a program to address the difficult and complex problem of interstate air pollution when states fail to act.[3] Congress, through the Act, also gave EPA the authority to use market-based mechanisms where appropriate to achieve national air quality standards. EPA exercised this authority in the Transport Rule, establishing a program utilizing both cost and air quality factors in a manner that fits most effectively with the competitive market for electric power generation in the United States. In contrast, the majority opinion below rejected any deference to agency expertise and created artificial, non-statutory limits on EPA authority that will prevent EPA now and in the future from harnessing such market-based measures, thereby driving up the cost of pollution control for the entire industry. For these reasons and the reasons articulated by Petitioners and other Respondents supporting Petitioners, the Court should reverse the majority ruling.

The Transport Rule regulates emissions from power plants throughout 27 states. These power plants, whether fired by coal, natural gas or oil, emit air pollution that adversely affects air quality not only in the states in which they are located, but in downwind states as well. The statutory impetus for the Transport Rule is the failure by upwind states to adopt laws and regulations sufficient to protect downwind states from these upwind pollution

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3. Respondents further support Respondent States and Municipalities with respect to their argument that states have the ability to fulfill their statutory obligation under the Good Neighbor Provision, without prior EPA action. *See* Brief for the Respondent States and Cities In Support of Petitions for Certiorari at 13-15.

sources as required by the Good Neighbor Provision. As a result of this failure, many areas of the country and millions of Americans living there experience air quality too poor to meet the minimum health-based National Ambient Air Quality Standards ("NAAQS") established by EPA pursuant to the Clean Air Act. EPA developed the Transport Rule to help downwind areas achieve and maintain the NAAQS for ozone and fine particulate matter ("$PM_{2.5}$") by controlling upwind emissions of precursor pollutants, oxides of nitrogen ("NO_x") and sulfur dioxide ("SO_2").[4] The rule targets power plants because power plants represent one of the largest sources of these pollutants.

EPA tailored the Transport Rule to work within the unique architecture of interstate wholesale electricity markets, and used the processes of those markets to promote necessary emission reductions, to ensure that those emission reductions will be largely sufficient to allow downwind areas to achieve and to maintain the relevant air quality standards, and to accomplish these goals in a cost-effective manner. EPA based the Transport Rule on reasonable policy choices and interpretations of the Act, ensuring that the Rule would work within the context of the electric generation industry to maximize efficiency and to minimize cost. EPA's use of an approach based on industry market dynamics was lawful and should be upheld, whereas the court of appeals' artificial limitations on EPA's authority would significantly inhibit such a cost-effective approach.

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4. For the Transport Rule, the relevant standards are the 1997 $PM_{2.5}$ annual NAAQS, the 2006 $PM_{2.5}$ 24-hour NAAQS and the 1997 8-hour ozone NAAQS. App. 168a. The Rule regulates emissions of NO_x and SO_2 which contribute to the formation of ozone and $PM_{2.5}$.

II. THE GRID AND WHOLESALE ELECTRICITY MARKETS

The Transport Rule was specifically designed to function in a competitive wholesale market for electricity where costs of operation are a key factor determining which plants operate and when. The Rule regulates emissions from over 1,300 generating units at power plants. These power plants, and many more outside the Transport Rule region, are connected to the nationwide network of electric transmission lines commonly referred to as the "grid." The grid is capable of transmitting electricity across state lines and even across entire regions in order to satisfy demand. The grid is managed by independent system operators, regional transmission organizations and local balancing authorities[5] ("grid operators") who bear the responsibility for assuring that adequate electricity is always available.[6] Grid operators must balance the amount of electricity generated with electricity demand in real time, as the grid itself has no storage capacity, and an imbalance between supply and demand can overload transmission lines or yield voltage drops that can cause potentially

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5. The grid in the Transport Rule states is administered by several grid operators: PJM Interconnection (thirteen states and D.C.); ISO New England (six states), New York ISO (New York only), Midwest ISO (twelve states); Southwest Power Pool (nine states); and the Electric Reliability Council of Texas (Texas only). The grid in remaining Transport Rule areas is served by local balancing authorities, who perform the same function.

6. EPA, *Regulatory Impact Analysis for the Final Transport Rule* at 226 (June 2011) ("*Regulatory Impact Analysis*"), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4547.

massive blackouts.[7] Because the grid operator has little control over electricity demand, the operator must control the amount of electricity supplied to the grid in order to maintain equilibrium in the system. This balance must be struck by taking into account many factors, including the magnitude, timing and location of demand, the availability of transmission lines serving those demand areas, the remaining available capacity of power plants, the speed with which those plants can increase their output and, in areas served by competitive energy markets, the price at which generators offer their electricity for sale.[8]

Most states covered by the Transport Rule are served by competitive wholesale electricity markets.[9] In these

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7. The New York Blackout of 2013 was caused by just such an imbalance. NY ISO, Blackout August 15, 2003 Final Report (Feb. 2005), http://www.nyiso.com/public/webdocs/media_room/press_releases/2005/blackout_rpt_final.pdf. For additional information on the role of grid operators, see EPA's *Allowance Allocation Final Rule Technical Support Document*, at 13-19 (June 2011) (*"Allowance Allocation TSD"*) (C.A. App. 3054-3060). *See also, e.g.*, ISO New England, http://www.iso-ne.com/nwsiss/grid_mkts/elec_works/oview_brochure.pdf.

8. *See* Federal Energy Regulatory Commission, *Centralized Capacity Market Design Elements*, Commission Staff Report AD13-7-000 (Aug. 23, 2013), http://www.ferc.gov/CalendarFiles/20130826142258-Staff%20Paper.pdf.

9. Of the 27 Transport Rule states, only eight will not be served in whole or in part by competitive wholesale electricity markets in 2014. In areas served by local balancing authorities, cost plays essentially the same role on an intrastate basis as described below for larger competitive markets, and power can still be imported from other states. *See Allowance Allocation TSD* at 17-18 (C.A. App. 3058-3059).

states, grid operators use a market-based mechanism to determine the order in which to call upon or "dispatch" power plants to feed electricity to the grid, selecting the least expensive generation units first and calling upon progressively more expensive units until demand is satisfied.[10] *See Allowance Allocation TSD* (C.A. App. 3054-3060); EPA, *Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model*, at 2-9 (Aug. 2010) ("*IPM Documentation*")[11] (C.A. App. 2347). The order of dispatch is determined by a bidding process. Each owner of a generating unit submits a "bid" to the grid operator indicating the price at which it is willing to run its unit. Typically, the bid will be no more than the unit's marginal operating cost, which consists of fuel and other variable costs associated with operating the unit. All other things being equal, the grid operator then dispatches units in ascending cost order until demand is met.

Counterintuitively, the price that each generator receives for its power is not necessarily based on its bid. Wholesale markets operate on the principle of the "single market clearing price;" all generators are paid the same price based on the bid of the last unit that "cleared the market," that is, the most expensive unit needed to meet demand.[12] This pricing scheme creates a powerful

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10. *See* PJM, Energy Market, http://pjm.com/markets-and-operations/energy.aspx.

11. EPA's *IPM Documentation* can be found at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-0309.

12. *See* Ross Baldick, *Single Clearing Price in Electricity Markets* (Feb. 2009), http://www.cramton.umd.edu/papers2005-2009/baldick-single-price-auction.pdf.

dual incentive to reduce operating costs: units with low operating costs and low bids are both dispatched more frequently than units with higher costs and higher bids, and produce a higher profit margin when they do operate. *See Clean Air Interstate Rule*, 70 Fed. Reg. 25,162, 25,256 (May 12, 2005). This incentive serves to reduce electricity prices to their minimum, but has significant implications for air pollution control. *See Regulatory Impact Analysis* at 236.

Pollution control requirements can impose significant capital costs for equipment such as "scrubbers" to reduce SO_2 and selective catalytic reduction systems to reduce NO_x. The operation of these systems, though, can also entail significant operating costs for higher-priced fuels, treatment chemicals, waste disposal and power and water consumption. Hence, power plants operating pollution controls have higher operating costs, resulting in higher bids and less frequent dispatch compared to uncontrolled units. Every power plant that incurs additional costs to reduce its emissions is at risk of being undercut by cheaper, dirtier plants that do not incur these additional pollution control costs. *See Allowance Allocation TSD* (C.A. App. 3055-3056). Respondents' cleaner environmentally-controlled, gas-fired and nuclear units can be more expensive to own and operate than uncontrolled units, and so they are placed at a disadvantage in competitive electricity markets where there is no incentive for higher emitting but lower-cost units, such as uncontrolled coal-fired plants, to reduce pollution by installing new controls or even operating existing controls.

If all competing generation units faced identical regulatory requirements, operating costs for pollution

controls might make little difference, but these requirements vary from plant to plant and state to state. The mandatory permit limitations applicable to a generation unit are determined by the year of the unit's construction. *See, e.g.*, 40 C.F.R. pt. 60 subpt. Da (new source performance standards for coal-fired units). New units are required to be equipped with state-of-the-art controls, and must operate those controls to meet stringent mandatory permit limits. Older plants are typically required to meet only those permit limits in place at the time they were built, which are far less stringent. More than one-third of the coal-fired units in operation today were in existence when the Clean Air Act was enacted in 1970, and have no pollution controls.[13] Although some older plants have opted to install pollution controls to take advantage of market incentives like those offered by the Transport Rule, they are not required to operate those controls to achieve a permit limit. Rather, they operate those controls only when economic conditions make it profitable to do so. Pollution control requirements also vary from state to state. Many states impose more stringent pollution control requirements than their neighbors because these controls are needed to attain air quality standards, or because they serve some other goal of the adopting state.

The Transport Rule is designed to function in light of the characteristics of the interstate aspects of power production, competition and pollution. Most grid operators

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13. Exelon Corporation Comments on the Proposed Transport Rule at 5, citing Exhibit 1, M.J. Bradley & Associates LLC & the Analysis Group, *Ensuring a Clean, Modern Electric Generating Fleet While Maintaining Electric System Reliability* at 16, Tbl. 5 (2010) (C.A. App. 0655, 0665, 0729).

serve multiple states, and power from one region can be sold into another. Power plants do not, therefore, compete only against plants in the same state, subject to the same regulations. They also compete against units in other states, including states where pollution control requirements are less stringent. Accordingly, when a downwind state suffering poor air quality increases pollution control requirements and thus operating costs, the effect may be to drive electric generation from increasingly expensive in-state units to units in upwind states with less stringent pollution control requirements, merely replacing in-state pollution with imported out-of-state pollution. These market forces can make it impossible for any individual downwind state, acting alone, to comply with air quality standards without a corresponding effort by upwind states to eliminate amounts of pollution that "contribute significantly to nonattainment in, or interfere with maintenance by" the downwind state, as required by the Good Neighbor Provision (collectively, "Downwind Impacts").

The Transport Rule incorporates the main model used by the electric generating industry in its own planning and assessment of market dynamics. While the competitive market system is fluid by design, it is not unpredictable. The electric generating industry uses a variety of sophisticated computer models to predict the operating behavior of power plants in response to various stimuli. One such model commonly used in the industry, and also used by EPA in forecasting economic impacts of regulations, including the Transport Rule, is the "Integrated Planning Model" or "IPM," a commercially available model. IPM is designed to "provide[] forecasts

of least cost capacity expansion, electricity dispatch, and emission control strategies while meeting energy demand and environmental, transmission, dispatch, and reliability constraints." *IPM Documentation* at 1-1 (C.A. App. 2333). Using IPM or a similar model, it is possible to predict, under a given set of circumstances, which power plants will be dispatched, and how much pollution they will emit. *See id.* at 2-1 to 2-4 (C.A. App. 2339-2342). IPM is commonly used by grid operators, generators and governments (including EPA and many state and interstate agencies) to plan for or predict amounts of future electricity generation and associated emissions, taking into account various economic and regulatory scenarios. For example, in developing the Transport Rule, EPA used IPM to evaluate which power plants would be dispatched and how emissions would change if generation units were required to incur additional costs for each ton of pollution they emit. This modeling was fundamental to EPA's evaluation of the most likely air quality impacts of different control scenarios, as well as the overall costs that would be borne by regulated sources. *See infra*, Statement of the Case V, Argument II.B.

Thus, the economic calculus of the wholesale electricity market both institutionalizes a disincentive to incur costs to reduce air pollution, and offers a predictable set of principles on which EPA can and did rely in crafting a cost-effective market-based program to reduce pollution from power plants. The Clean Air Act authorizes, and even promotes, market-based regulatory solutions, and EPA, under the Act's authority, has exploited the predictable behavior of the electricity market to implement such solutions before.

III. STATUTORY HISTORY AND AUTHORITY FOR MARKET-BASED REGULATION

Before 1990, the Clean Air Act included many prescriptive operational or "command-and-control" imperatives, including unit-specific limits and directives to employ certain technologies. Because this approach was broadly applied and afforded minimal compliance flexibility, it increased the cost of compliance, sometimes with little or no environmental benefit.[14] The signature achievement of the 1990 Amendments to the Clean Air Act ("1990 Amendments" or "Amendments") was the creation in Title IV of a very successful national trading program to reduce the precursors of acid rain, which provided a market-based alternative to controls based on percentage reductions of emissions through the use of specific technologies for acid gas control. *See* Pub. L. No. 101-549, § 401, 104 Stat. 2399, 2584 (codified as 42 U.S.C. §§ 7651-7651o (1990)); *see generally*, Goffman, *supra*. *See also, Regulatory Impact Analysis* at 232-233.

The 1990 Amendments did not limit the application of market mechanisms to acid rain, but included provisions authorizing the use of market mechanisms and regional approaches to address the persistent problems of achieving and maintaining air quality standards under Title I of the Act. First, the Amendments broadened the

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14. *See* Joseph Goffman, *Title IV of the Clean Air Act: Lessons for Success of the Acid Rain Emissions Trading Program*, 14 Penn St. Envtl. L. Rev. 177, 184 (2006); Bruce A. Ackerman and William T. Hassler, *Clean Coal/Dirty Air: or How the Clean Air Act Became a Multibillion-Dollar Bail-Out for High-Sulfur Coal Producers And What Should be Done About It* (Yale University Press 1981).

concept of "emission limitations" for the purposes of state and federal implementation plans to include market-based programs in sections 110(a)(2)(A) and 302(y). 42 U.S.C. §§ 7410(a)(2)(A), 7602(y). The Amendments did so by adding the parenthetical "(including economic incentives such as fees, marketable permits, and auctions of emissions rights)" after the existing requirement that state implementation plans ("SIPs") "include enforceable emission limitations and other control measures, means, or techniques," and by adding a definition of "federal implementation plan" that includes the same language. Pub. L. No. 101-549, §§ 101(b), 108(j), 104 Stat. at 2404, 2468 (codified as 42 U.S.C. §§ 7410(a)(2)(A), 7602(y)).

Notably, President George H.W. Bush specifically emphasized the importance of the 1990 Amendments' authorization of market mechanisms in signing the law:

> The innovative use of market incentives in the bill represents the turning of a new page in our approach to environmental problems in this country. . . . By employing a system that generates the most environmental protection for every dollar spent, the trading system lays the groundwork for a new era of smarter government regulation; one that is more compatible with economic growth than using only the command and control approaches of the past. . . . The result will be the dawning of a new era in regulatory policy, one that relies on the market to reconcile the environment and the economy.

President's Statement on Signing of S. 1630, the Amendments to the Clean Air Act (Nov. 15, 1990),

reprinted in 1 S. Comm. on Environment & Public Works, *A Legislative History of the Clean Air Amendments of 1990* at 727 (1998).

Further, Congress demonstrated an evolution in addressing interstate pollution by moving from a source-by-source program to one that focused more regionally, leading the way toward regional trading programs. To that end, the 1990 Amendments modified the same Good Neighbor Provision at issue in this litigation. Prior to the Amendments, the Act required states to adopt provisions prohibiting emissions from particular stationary sources that "will . . . prevent attainment or maintenance" of the NAAQS in downwind states. Pub. L. No. 95-95, § 108, 91 Stat. 685, 693 (codified as 42 U.S.C. § 7410(a)(2)(E) (1977)). Recognizing that this language was inadequate to compel upwind states to address impacts in downwind states, Congress extended the reach of the Good Neighbor Provision beyond a single stationary source to cover "any source or other type of emissions activity," and required states to prohibit emissions that merely "contribute significantly" to downwind nonattainment or "interfere" with maintenance, whether or not those emissions would, on their own, "prevent" attainment. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

In the 1990 Amendments, Congress also specified that one of the purposes of the Act was "to encourage and assist the development and operation of regional air pollution prevention and control programs." 42 U.S.C. § 7401(a)(1), (b)(4); Pub. L. No. 101-549, § 108(k), 104 Stat. at 2468. Congress further provided for the creation of interstate transport regions and corresponding interstate transport commissions "[w]henever . . . the Administrator has reason to believe that the interstate transport of air pollutants

from one or more States contributes significantly to a violation of a national ambient air quality standard in one or more other States." Pub. L. No. 101-549, § 102(f)(1), 104 Stat. at 2419 (codified as 42 U.S.C. § 7506a). Congress directly created an ozone transport region consisting of eleven northeastern states and the District of Columbia, and established the Ozone Transport Commission. 42 U.S.C. § 7511c.

In accordance with these expressions of Congressional intent, the Ozone Transport Commission initiated the first effort to address the persistent problem of interstate contribution to ozone formation by developing budgets and a trading program for NO_x. EPA sought to encourage this program and other programs by proposing a model open market trading rule. *See* 60 Fed. Reg. 39,668 (Aug. 3, 1995). A larger group of states, industry and non-governmental organizations formed the Ozone Transport Advisory Group ("OTAG") which "concluded that widespread NO_x reductions [we]re needed in order to enable areas to attain and maintain the ozone NAAQS." 62 Fed. Reg. 60,318, 60,320 (Nov. 7, 1997). Based on those recommendations and modeling conducted by the states and others in the OTAG effort, EPA proposed and ultimately adopted a regulation known as the "NO_x SIP Call." *Id.*; 63 Fed. Reg. 57,356 (Oct. 27, 1998). The NO_x SIP Call was upheld by the D.C. Circuit in *Michigan v. EPA*, 213 F.3d 663 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 903, 904 (2001). It employed largely the same methodology for selecting states to be included in an interstate emissions trading program and for determining the emission reduction requirements that EPA used again in the Clean Air Interstate Rule ("CAIR"), 70 Fed. Reg. 25,162 (May 12, 2005), and the Transport Rule.

IV. SUITABILITY AND HISTORY OF MARKET-BASED REGULATION OF THE ELECTRIC GENERATION SYSTEM IN THE INTERSTATE EMISSIONS CONTEXT

The Transport Rule not only drew its market-based regional approach from Congressional direction, but it built upon the Agency's preceding interstate pollution prevention programs, the NO_x SIP Call and CAIR, modifying any portions that had been determined unlawful and strengthening provisions to better ensure that necessary emission reductions occur. Each of these programs focuses on the electric power generation industry, which is appropriate since power plants, particularly older coal-fired plants lacking modern pollution controls, are among the most significant sources of NO_x and SO_2 emissions, which cause interstate pollution having Downwind Impacts. *Regulatory Impact Analysis* at 228-229. Moreover, each of the three programs harnesses the grid's ability to shift generation in accordance with cost stimuli to achieve the goals of balancing and leveling the costs of emission reductions while achieving the most cost-effective emission reductions with the least regulatory burden. *See id.* at 275. The Transport Rule, like its predecessors, employs a market-based allowance trading program, also referred to as a "cap-and-trade" program. In such a program, EPA establishes a total amount of permissible emissions for each covered state in tons per year (the "budget" or "cap"), creates an equal number of tradable "allowances," and requires each power plant in those states covered by the regulation to turn in one allowance for every ton of pollution it emits.

These allowances are the "marketable permits" that were expressly authorized by the 1990 Amendments.[15]

Under the trading mechanisms used by the Transport Rule and its predecessors, the owner of any power plant is free to decide whether to comply with the law by buying allowances from other plants to cover its emissions, or reducing its emissions by installing or operating pollution controls.[16] *See Regulatory Impact Analysis* at 255-56 (C.A. App. 3192-93). Owners who operate controls will include those additional operating costs in their bids into wholesale electricity markets, and owners who opt to purchase allowances will also need to increase their bids to account for the cost of those allowances. *Allowance Allocation TSD* at 14-15 (C.A. App. 3055-3056) (explaining that the economic determination of unit dispatch will

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15. The economics literature discussing trading programs (including cap-and-trade) often refers to "marketable permits" rather than "allowances." *See, e.g.*, Tom Tietenberg, *Tradable Permits in Principle and Practice*, 14 Penn St. Envtl. L. Rev. 251 (2006).

16. Aside from geographic scope, the trading program established in the Transport Rule differed from that in the prior programs only as necessary to address criticisms in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). In that case, the court of appeals invalidated CAIR's trading program not because it faulted EPA's method of identifying pollution that "contributes significantly" to Downwind Impacts or disapproved of trading programs in general, but because EPA did not calculate budgets on a state-by-state basis, and CAIR's trading program failed to employ measures to ensure that every state would reduce its emissions as necessary to eliminate their significant contribution to Downwind Impacts and "maintain" the NAAQS in the long run. *Id.* at 906-908.

reflect the market value of emitting, *i.e.*, the allowance price). As the electricity market responds to these changing bid patterns, air pollution is reduced in two ways. Plants equipped with controls have the financial incentive necessary to operate those controls, producing less pollution. Correspondingly, uncontrolled plants that must raise their bids no longer undercut cleaner plants, and will thus be dispatched less frequently in favor of plants operating controls or plants that inherently emit less pollution per unit of electricity generated. In the longer term, this approach will also encourage greater investment in plants that emit little or no air pollution, such as solar, wind and nuclear generation. *Regulatory Impact Analysis* at 262, Fig. 7-5 (projected generation mix) (C.A. App. 3198). The electric power industry has uniformly preferred this market-based approach to the alternatives: EPA-imposed limits on specific power plants affecting downwind states, or uniform limits on all power plants. *See* App. 426a, 430a-431a (noting "great majority of public comments" supported Transport Rule trading program over "direct control" approach). EPA, in fact, considered a "direct control" alternative and rejected it because it would not be cost-effective, would be inflexible and could lead to issues threatening the reliability of electricity supply. *Id.*

A cap-and-trade program is particularly well-suited to the electricity system. As demonstrated in the Title IV Acid Rain Program and the other market-based programs noted above, industry will respond to clear cost signals in an economically rational fashion to achieve the necessary emission reductions. This allows EPA (or states) to use IPM or similar models to predict changes in emission patterns, which can in turn be modeled to predict the

impact on air quality.[17] Generators will buy allowances when they are cheaper than the cost of reducing emissions, and reduce emissions when it is cheaper than buying allowances. *Regulatory Impact Analysis* at 259-260 (C.A. App. 3195-3196). Industry will incorporate the same logic into decision-making regarding construction of new power plants, building new low- or zero-emission plants and closing older high-emission plants where economically justified.[18] *Id.* at 255-256 (C.A. App. 3192-3193).

Conversely, these established behaviors will undermine approaches that do not incorporate market factors. Because generation dispatch decisions are based on lowest cost, requirements that emissions be reduced at some but not all power plants will simply shift generation, and the pollution that comes with it, to plants not subject to those requirements. Rather than decreasing the total amount of pollution, such more "surgical" approaches merely relocate the pollution on the map. *See* 70 Fed. Reg. at 25,256-25,257.

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17. EPA's use of IPM to predict emission reductions in response to market-based programs has been upheld by the courts. *See, e.g., Appalachian Power Co., et al. v. EPA*, 249 F.3d 1032, 1052-53 (D.C. Cir. 2001).

18. In proposing the NO_x SIP Call in 1997, EPA found that the proposed cap-and-trade program "provides a proven and cost-effective method for achieving and maintaining a fixed tonnage budget while providing maximum compliance flexibility to affected sources." EPA noted that the reductions produced by the program "will be those of lowest cost, since each source will identify and implement the specific control technology, pollution-minimizing fuel, energy efficiency, or production mix that offers the greatest amount of pollution reduction at the least cost." 62 Fed. Reg. at 60,371.

EPA's prior market-based approaches to interstate pollution reduction (NO_x SIP Call and CAIR) as well as the Title IV Acid Rain Program created thriving interstate markets for allowances, characterized by rational pricing and liquidity.[19] Once emission budgets[20] (and therefore the number of allowances available) are set, the market establishes the price of the allowances. The effectiveness of the program will ultimately be determined by how this market allowance price compares to the real cost of reducing emissions. Ideally, once the emission reduction goals of the program are met, allowance prices will tend to fall, reflecting a sufficient supply, or even a surplus. Past programs exhibited this behavior, achieving notable reductions in emissions at relatively low cost. *See* App. 541a. However, CAIR was vacated because it could not ensure that upwind states would make the reductions required by the Good Neighbor Provision.[21] The Transport Rule was promulgated to remedy this issue. App. 134a-137a. EPA developed a program based on a uniform cost structure to ensure the necessary emission reductions while balancing the obligations of upwind and downwind states.

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19. The prices for Title IV Acid Rain Program allowances and CAIR allowances are monitored and publicly available. *See* Evolution Markets, http://www.evomarkets.com/environment/emissions_markets (listing current market prices).

20. Some confusion can arise from EPA's varying use of the term "budget" in the various rules. Here we use the term "budget" to be synonymous with the statewide cap, as EPA used the term in the Transport Rule.

21. For example, the court of appeals found that CAIR did not require sufficiently prompt emission reductions to achieve revised air quality standards on the schedule required by the Act. *North Carolina*, 531 F.3d at 911-12, *reh'g granted*, 550 F.3d 1176, 1177-1178 (D.C. Cir. 2008).

V. EPA'S APPROACH TO DEVELOPING BUDGETS IN THE TRANSPORT RULE, AND THE IMPORTANCE OF COST CONSIDERATIONS

The nature of the electricity market and the myriad upwind contributions to Downwind Impacts demand a comprehensive approach to address interstate pollution. In the Transport Rule, EPA modeled both air quality and cost factors to determine precisely what levels of control are necessary to prevent emissions from upwind states that "contribute significantly" to these Downwind Impacts. *See* App. 316a-323a. EPA used essentially the same procedures it developed from state efforts and modeling in the OTAG process and first used in the NO_x SIP Call and then again in CAIR; this methodology had been upheld by the court of appeals. In each of these rules, EPA employed a two-step process: first, a "Screening Analysis" to identify the states to consider for inclusion in the program; and second, a "Control Analysis" to determine the emissions budgets or caps that would be necessary to attain and maintain the relevant air quality standards.

Although EPA describes its methodology as a two-step approach, the method is actually a more complex, iterative, technical process.[22] In this process, EPA performed air quality modeling of thousands of air pollution sources and their impacts on downwind points

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22. Although it is a complex technical task, this should not be read to mean it is beyond the ken of the states. As noted above, EPA relied on state efforts and modeling in the OTAG to develop the method in the NO_x SIP Call, 63 Fed. Reg. at 57,362, and states continue to have and to demonstrate their capacity to make these assessments. *See* App. 89a-91a (Rogers, J., dissenting).

across the eastern United States. EPA then conducted economic modeling to determine how the thousands of parties involved in electricity generation, transmission and distribution would respond to the economic signals provided by the emission budgets in the Transport Rule. Such responses would include installation of controls, switching of fuels and changes in the dispatch of power plants, which were then assessed to evaluate impacts on emissions across the geographic areas affected by the Transport Rule. These changes in emissions and dispatch were fed back into air quality models to determine the program's overall effectiveness from an air quality standpoint. The complexity of this analysis is further increased by the fact that interstate transport can come from thousands of sources, located in many states, with varying downwind impacts that decrease over distance at hundreds of downwind monitoring points. *See* App. 282a-309a (tables showing "linkages" of upwind states to downwind monitoring points).

In its "Screening Analysis," EPA determined which states should be subject to further analysis. At this step, EPA excluded only those states whose contributions to downwind pollution levels *at all possible downwind nonattainment or maintenance receptors* was so insubstantial that, in EPA's judgment, the exclusion of those states would be immaterial. App. 136a, 255a-258a. EPA took the position that if a state's emissions increased ambient concentrations of pollutants above a threshold (1% of the relevant NAAQS) in at least one downwind area that faced Downwind Impacts, it should be subject to further analysis. In this step, EPA asked whether the *maximum* contribution from a given State at *all* downwind receptors fell below that threshold level. If so, EPA could safely conclude that imposing highly cost-effective controls

on sources in that state would not materially improve downwind maintenance and attainment and so exclude the state from coverage of the Rule. If the state exceeded the screening level at even one downwind nonattainment or maintenance area, it was included, even if its contributions at the vast majority of downwind points would *not* exceed the screening level.

Once EPA completed its Screening Analysis, it employed a "Control Analysis" to establish emission control obligations for each covered upwind state based on the "amounts" of pollution from the state that "contribute significantly" to Downwind Impacts. App. 310a. The Agency did so by testing the impact of cost thresholds — hypothetical allowance costs — on electric generation patterns, and modeling the effect on downwind air quality. *See* App. 316a-323a. Using the power industry's IPM, EPA first identified and quantified the emission reductions that would occur at various cost per ton thresholds in each covered state. EPA then used an air quality assessment tool to estimate the impact that the combined reductions available from upwind states and downwind states at each of the identified cost-thresholds would have on air quality. *Id.*

EPA evaluated a number of cost thresholds, beginning with the minimum cost of operating controls. Using information from the power industry, EPA concluded that $500 per ton was a reasonable approximation of the incremental operating cost necessary to remove one ton of NO_x or one ton of SO_2 in the absence of an interstate program (for some states, a higher SO_2 control cost was ultimately required). App. 355a. Below $500 per ton, few emission reductions will actually occur, as it would be cheaper for generators to purchase a sub-$500

allowance than to incur $500 in costs to eliminate one ton of emissions. EPA also tested several higher cost assumptions, and plotted these costs and the emission reductions they produced. *See* App. 361a. These data revealed "break points" in the cost curve at which large upwind reductions from sources occur and above which higher costs do not yield material reductions. EPA then examined how the emission reductions reflected by these cost-effective "break points" would impact air quality in states where Downwind Impacts affect compliance with the relevant NAAQS. EPA concluded that the emission reductions at these break points would be sufficient to eliminate pollution that contributes significantly to Downwind Impacts in nearly all downwind areas, whereas cost levels below the break points would be insufficient to incentivize operation of controls or other strategies to reduce emissions. App. 349a-365a; EPA, *Significant Contribution and State Emissions Budgets Final Rule Technical Support Document* (July 2011) (C.A. App. 2930-2985). *See generally*, App. 310a-392a.

Notably, the "break points" did not themselves represent "significant contribution," but rather served as uniform starting points for that determination on a state-specific basis. *See, e.g.*, App. 310a. This uniformity was necessary in order to balance the obligations among states under EPA's multi-factor analysis of "contribute significantly," so that all covered sources contributing at all levels to Downwind Impacts were presented with the same minimum pollution control cost needed to achieve and maintain the NAAQS under EPA's modeling. EPA established each state budget based on the amount of pollution that covered power plants in the state would produce in an average year, after applying the cost

threshold (*e.g.*, $500 per ton of NO_x emissions). Having determined that these cost-effective state budgets would eliminate nearly all Downwind Impacts, EPA concluded that the "amount" of pollution that must be prohibited under the Good Neighbor Provision is the difference between those budgets and the amount of pollution that upwind states would emit absent the Transport Rule. That is, the state budget is the amount of pollution that the covered power plants in the state will produce in an average year, once the state eliminates those amounts that "contribute significantly" to nonattainment or "interfere with maintenance" in downwind areas. App. 323a. Unlike CAIR, which relied on a regional cost analysis, EPA determined emission budgets for the Transport Rule on state-specific factors, following the dictates of *North Carolina*. *See North Carolina*, 531 F.3d at 908-909, 917-18. *See also*, App. 316a-320a.

While the cost of reducing emissions was a key factor EPA used to define "amounts" that "contribute significantly," cost was not used to reduce or to increase an upwind state's obligation to make emission reductions. Rather, EPA used cost to balance responsibility between upwind and downwind states. EPA recognized that the goal of the Good Neighbor Provision is not to shift responsibility for achieving or maintaining the NAAQS to upwind states. *See* App. 316a-320a. However, downwind states having nonattainment or maintenance areas already require control measures costing far more than the modest costs imposed by the Transport Rule.[23] EPA

23. Downwind states "have already implemented successful programs at much greater per ton costs (some are even greater than $40,000/ton)." NESCAUM Comments on the Proposed Transport Rule (Oct. 1, 2010) (C.A. App. 0825, 0829).

interpreted the Good Neighbor Provision to assure that all contributing states require that sources incur at least a minimum cost to reduce pollution, when their collective emissions cause Downwind Impacts.

The resulting Transport Rule is highly cost-effective and redressed significant regional inequities between upwind areas that incur very low emission control costs and downwind areas that incur very high emission control costs but suffer the impacts of emissions from upwind areas. EPA's cost-benefit analysis determined that "the annual net benefit (social benefits minus social costs)" of the Transport Rule in 2014 would be $110 to $280 billion, vastly exceeding 2014 compliance costs of less than $1 billion. App. 611a.; *see also*, Exelon Corporation Comments on the Proposed Transport Rule at 3-5, 13-15 (C.A. App. 0655, 0663-0665, 0673-0675), and Exhibit 2, Dr. Charles J. Cicchetti, Ph.D., *The True Cost of Harmful Pollution to Downwind Families and Business* (Sept. 2010) (concluding that EPA's cost-benefit analysis likely understates the benefits of implementing the proposed Transport Rule and overstates the likely compliance costs) (C.A. App. 0738-0805).

VI. THE DECISION BELOW

A summary of the court of appeals' decision appears in the Petitioners' briefs and is incorporated herein by reference.

SUMMARY OF ARGUMENT

The Transport Rule is based on EPA interpretations of the Good Neighbor Provision of the Clean Air Act. That provision is ambiguous, and Congress has commended the implementation of that provision to the expert judgment of EPA when states have failed to fulfill their obligations under that provision. EPA's judgment in this regard must be afforded the highest degree of deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), and must not be disturbed unless it is unreasonable or prohibited by law.

The Transport Rule represents a reasonable interpretation of the Good Neighbor Provision. EPA employed a methodology that it adopted in two prior rules and that had been upheld by the court of appeals. The methodology works within the framework of the electricity market in a way that achieves the goals of the Act by deploying the type of market-based program that Congress prefers, minimizing overall cost and disruption to the electric power industry and balancing cost and responsibility equitably and efficiently among the states. EPA's approach is reasonable and permissible under the Act.

The court of appeals erred by usurping the authority of the Executive Branch, enshrined in the Act and in this Court's holdings in *Chevron* and its progeny. Clumsily trespassing in the province of the expert administrative agency, the court of appeals ignored its prior holdings and found that the Transport Rule violated three constraints of the court's own invention. These "red lines" are not found in the statute, and therefore have no place in a *Chevron*

analysis. Moreover, the three constraints minted by the court of appeals are impracticable and based on a gross oversimplification of the complex economic and scientific problems addressed by the Transport Rule. The court of appeals' criteria effectively eliminate the possibility that EPA will be able to implement the Good Neighbor Provision using a cost-effective, market-based solution, but will instead be forced to deploy more coercive unit-specific "command-and-control" requirements in derogation of Congressional preference and to the detriment of the electric power industry.

The Court should reverse the decision of the court of appeals and reinstate the Transport Rule.

ARGUMENT

I. THE GOOD NEIGHBOR PROVISION IS AMBIGUOUS, AND EPA, AS THE EXPERT ADMINISTRATIVE AGENCY CHARGED BY CONGRESS WITH IMPLEMENTING THE PROVISION, IS ENTITLED TO DEFERENCE IN ITS INTERPRETATION.

This Court laid out the framework for analyzing the propriety of an agency's interpretation of its rulemaking authority in *Chevron*, and reaffirmed that framework earlier this year in *City of Arlington, et al. v. Federal Communications Commission, et al.*, 133 S. Ct. 1863 (2013). This analysis must begin with the statute itself, for if the statute unambiguously authorizes or prohibits the agency's interpretation, the Court's inquiry ends there. If, however, the statute is silent or ambiguous as to its mandate, the Court is required to give deference

to the agency's interpretation, and must not disturb the agency's interpretation or policy choices so long as they are reasonable and not prohibited by other, unambiguous provisions of the statute. *Chevron*, 467 U.S. at 844-45 (citing *United States v. Shimer*, 367 U.S. 374, 382-383 (1961)). *See also, City of Arlington*, 133 S. Ct. at 1868.

The Transport Rule was issued to implement the Clean Air Act's Good Neighbor Provision. That provision requires that each state adopt a State Implementation Plan, or SIP, that shall:

> (D) contain adequate provisions—
>
> (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) *contribute significantly* to nonattainment in, or *interfere* with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard . . .

42 U.S.C. § 7410(a)(2)(D) (emphasis added). The statute does not define the key terms "contribute significantly" or "interfere," nor does it provide any direction as to how these terms should be quantified.

In developing a program to satisfy these requirements, states, or as here, EPA in the absence of state action, must determine the "amounts" of pollution that must be prohibited, a task which requires them to interpret the

terms "contribute significantly" and "interfere." In this specialized context, the ordinary definitions of these terms are not dispositive. *Nat'l R.R. Passenger Corp. v. Boston & Me. Corp.*, 503 U.S. 407, 418 (1992) ("The existence of alternative dictionary definitions of the word, each making some sense under the statute, itself indicates that the statute is open to interpretation.") [24] All pollution that reaches a nonattainment area "contributes" to exceeding the standard. All pollution that reaches a maintenance area — an area at risk of exceeding the standard — pushes air quality closer to the edge, and thereby "interferes" with the area's ability to maintain compliance. The term "significantly" inherently requires a value judgment as to what amounts of contribution are meaningful enough to prohibit under the Good Neighbor Provision, and what amounts are not. These key statutory terms are ambiguous, and beg for definition, quantification, and elaboration by the expert agency. *Boston & Me. Corp.*, 503 U.S. at 418 ("Few phrases in a complex scheme of

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24. The "ordinary meanings" of these statutory terms are as ambiguous as the terms themselves, and do not suggest any particular means of quantification. *See, e.g.*, *Webster's Dictionary* (2d International Unabridged Ed. 1948) (defining "significant" as "having a meaning" and "deserving to be considered"); *Webster's Third New International Dictionary* 2116 (2002) (as, *inter alia*, "having meaning," "having or likely to have influence or effect"); *Oxford English Dictionary* (2d ed.1989) ("important, notable"); *Webster's Third New International Dictionary* 2116 (3rd ed.1986) ("having meaning"). *See also*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/interfere (defining "interfere" as, *inter alia*, "to interpose in a way that hinders or impedes"). *See also*, Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/contribute (defining "contribute" as, *inter alia*, "to give or supply in common with others" or "to play a significant part in bringing about an end or result").

regulation are so clear as to be beyond the need for interpretation when applied in a real context").

EPA initially addressed the ambiguity in the meaning of the Good Neighbor Provision in developing and adopting the Transport Rule's first predecessor, the NO_x SIP Call, in which EPA also first employed the two-step method used in the Transport Rule. In proposing and ultimately adopting the NO_x SIP Call, EPA expressly found that the term "contribute significantly" required definition. 62 Fed. Reg. at 60,325, 60,335 (there is no "bright line" for determining what constitutes significant contribution). When called upon to evaluate this conclusion, and the methodology adopted by EPA in the NO_x SIP Call, the court of appeals agreed that the term "significantly" as used in the Good Neighbor Provision is undefined in the Act and ambiguous, and therefore required that the courts afford EPA's determinations the highest degree of deference. *Michigan*, 213 F.3d at 674, 677-79.

While it may be fair to conclude that EPA's interpretations reflected in the two-step method used to develop the Transport Rule are not the *only* ones permitted by the statute, it is impossible to find that the Clean Air Act unambiguously requires a different scheme. *See id.* at 677-680 (the statute does not unambiguously conflict with EPA's two-step approach for determining substantial contribution); *North Carolina*, 531 F.3d at 916-917 (court again declining to disturb EPA's use of the same two-step approach in CAIR). *Chevron* and its progeny call for the Court to proceed past an initial analysis of the statutory language, and to evaluate the reasonableness of EPA's interpretation of the Act. The Court must uphold EPA's interpretation as long as it is reasonable and permissible under the Act. *Chevron*, 467 U.S. at 844-45.

II. EPA'S INTERPRETATION OF THE GOOD NEIGHBOR PROVISION, AND SPECIFICALLY THE ROLE OF COST IN THAT INTERPRETATION, IS REASONABLE, AND NOT PROHIBITED BY THE STATUTE.

A. EPA Acted Reasonably In Designing The Transport Rule To Harness The Structure Of The Wholesale Electricity Markets To Achieve The Goals Of The Good Neighbor Provision.

In light of the clear Congressional preference for market-based systems and the characteristics of the electric generation system, in the Transport Rule, as in CAIR and the NO_x SIP Call, EPA adopted an allowance trading program that allows the market to dictate where emission reductions will occur at the lowest cost. Industry uniformly favors such systems due to their economic efficiency and flexibility, as compared to more expensive command-and-control approaches. There was broad support among industry proponents and detractors of the Transport Rule for a market-based approach, and many urged EPA not to adopt direct controls. App. 430a-431a.[25]

The Transport Rule reduces emissions by limiting the number of available allowances, causing allowance prices to increase until the price justifies operation of emission controls or causes dispatch to switch to generation sources that inherently emit less pollution. Emission reductions come from switching electric generation from otherwise

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25. *See also*, EPA, *Transport Rule Primary Response to Comments* at 883-889, 1554-1562 (June 2011), http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OAR-2009-0491-4513.

cheaper, uncontrolled units to units using cleaner fuels or technologies or to units that operate pollution control technologies. For units that have controls, the cost of operating those controls to achieve reductions is offset by the sale of surplus allowances to units that operate without controls. Units that emit pollutants but lack air pollution controls will need to absorb the cost of allowances as operating costs, raising their minimum bids into the wholesale electricity market. As the minimum bid of uncontrolled units rises, those units will be dispatched less frequently, while cleaner units will be dispatched more frequently.

EPA can implement a state budget-based market system only if it possesses the tools to predict that the market will produce reductions that actually "achieve something measurable" in response to those budgets. *North Carolina*, 531 F.3d at 907-908. In developing state emission budgets for the Transport Rule, EPA used both an air pollution transport model and IPM to evaluate how pollution control costs would shift generation among power plants, and how downwind air quality would be affected by these shifts. EPA used existing data to predict how individual sources within each state would respond to a certain fixed cost (yielding the state budgets), and how the resulting change in emission patterns would affect downwind pollution (eliminating the most significant upwind contributions to Downwind Impacts).

B. EPA's Use Of Cost In Developing The Transport Rule Was Both Reasonable And Permissible.

Because the Good Neighbor Provision is ambiguous, EPA's interpretation of the term "contributes significantly" must be evaluated under *Chevron* Step 2. *Chevron*, 467

U.S. at 843 ("question for the court is whether the agency's answer is based on a permissible construction of the statute.").

As an initial matter, it is important to recall that the methodology of the Transport Rule is merely the most recent iteration of the same methodology used in regulatory programs that have existed for more than a decade. EPA's use of cost in the Transport Rule is fully consistent with its past practice which was specifically approved by prior judicial decisions. For example, in the NO_x SIP Call, EPA used the two-step analysis, first determining which states were covered under an air-quality analysis, and then using uniform "highly cost-effective controls" or "cutback costs" to determine the amount of upwind state emissions considered to be significant under the Good Neighbor Provision. The D.C. Circuit expressly approved of this approach, holding that "in selecting the 'significant' level of 'contribution' under section 110(a)(2)(D)(i)(I), [EPA could] choose a level corresponding to a certain reduction cost." *North Carolina*, 531 F.3d at 917 (citing *Michigan*, 213 F.3d at 676-77). *Michigan* further allowed EPA to apply uniform control costs across states. *Michigan*, 213 F.3d at 679-80. This Court referenced *Michigan*'s ruling on cost consideration, leaving it in place. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 469 n.1 (2001).[26]

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26. This case does not implicate the permissibility of considering cost *to establish* an air quality standard, as in *Whitman*, 531 U.S. at 468-471. Rather, this case involves only the extent to which EPA may consider cost in interpreting the Good Neighbor Provision's requirement that upwind states eliminate their "significant" contributions to Downwind Impacts — the same issue addressed in *Michigan*, which the *Whitman* court distinguished. *Id.* at 469, n.1.

EPA employed a similar two-step process in CAIR. While striking the rule down on other grounds, the *North Carolina* court expressly declined to disturb the use of such an approach, allowing EPA again to use cost data "unrelated to [the air quality] criterion" to determine the amount of each covered state's significant contribution as well as application of a "uniform cost-criterion across states." *North Carolina*, 531 F.3d at 904, 916-917. EPA referenced these court decisions in detail and explained how it developed the Transport Rule in conformity with them. App. 418a-422a, 576a-582a.

Under a *Chevron* Step 2 analysis, EPA's methodology is entirely reasonable and permissible. *See Michigan*, 213 F.3d at 679 ("there is nothing in the text, structure, or history of [the Good Neighbor Provision] that bars EPA from considering cost in its application"). EPA adequately explained the basis for its use of uniform cost thresholds or "break points" and why it chose to analyze these inputs on a state-by-state basis, as directed by *North Carolina*. Moreover, EPA made sure its approach would be fully consistent with, and addressed the practical realities of, the electric generation system. The agency did so by taking into account emission reductions that could reasonably be made by contributing upwind states that would allow a given downwind state to attain or maintain NAAQS. In doing so, EPA considered the emission impacts on the downwind state from multiple upwind sources as well as from within the downwind state, and considered the relative costs of reducing emissions from all of these sources. That way, EPA could be assured that sources in upwind states would need to operate their controls or take other actions to reduce their pollution so that downwind states would not bear the burden of reductions entirely on

their own. EPA also reduced incentives for cheaper, less controlled power to move from a downwind state to an upwind state, a result that would negate the effectiveness of the emission reductions.

Comity aside, upwind states have a powerful disincentive to reduce their emissions to promote air quality in downwind states. This is not a problem of capacity; states are fully capable of doing the same modeling EPA did for the Transport Rule. *See supra*, note 3. Rather, it is a problem of opportunism; when one state limits emissions and a second fails to do so, plants in the second will operate more frequently, generating additional income while exporting additional pollution to downwind states and harming the businesses, health and economy of the downwind areas. Dr. Charles J. Cicchetti, Ph.D., *The True Cost of Harmful Pollution to Downwind Families and Business* (Sept. 2010) (Exhibit 2 to Exelon Corporation Comments on the Proposed Transport Rule) (C.A. App. 0738-0805).

EPA's selected "break points" were also reasonably determined, based on cost analyses and air quality monitoring. For example, in selecting a cost level for ozone-season NO_x, EPA examined several levels: $500, $1,000 and $2,500 per ton and determined that the $500 per ton control cost was the threshold above which returns would "rapidly diminish[]." App. 351a. EPA determined that the $500 figure adequately reflected the costs of installing and operating available combustion controls to reduce NO_x emissions to a point where most but not all Downwind Impacts could be eliminated. A lower cost threshold could cause sources to cease operating their controls, potentially increasing emissions, whereas

a higher cost threshold would achieve only minimal additional reductions, bypassing less expensive reductions that could be secured from other industries, and could result in shifting some burden of attainment to upwind states. App. 320a-325a, 349a-356a. For annual NO_x, EPA made the same determination as to costs below $500 as it did for ozone season NO_x, and determined higher cost thresholds were not necessary if an adequate SO_2 cost threshold were used. App. 349a-356a.

As to SO_2, EPA also considered a range of cost thresholds: $500, $1,600, $2,300, $2,800, $3,300 and $10,000 per ton. App. 330a. EPA determined that for some upwind states, the $500 figure again adequately captured emission reductions feasible by operating existing controls to achieve the necessary reductions. EPA called these "Group 2" states. However, EPA determined that a number of other states, called "Group 1" states, would not eliminate their Downwind Impacts at the $500 threshold. For Group 1 states, EPA found that a higher cost-threshold, reflecting installation of further pollution controls, would provide cost-effective reductions that would, in almost all cases, reduce those states' significant contributions to Downwind Impacts. EPA selected a $2,300 per ton cost for Group 1 states to reflect the more expensive controls that would be necessary to make the emission reductions required in 2014. Costs below that figure were insufficient to cause power plants in Group 1 states to install the necessary controls, and costs above that figure would result in smaller gains per dollar. App. 329a-334a, 356a-360a. In every case, the cost thresholds used by EPA for upwind states were far lower than costs already required within many downwind states struggling to achieve air quality standards. EPA, *Significant*

Contribution and State Emissions Budgets Final Rule Technical Support Document (July 2011) (C.A. App. 2930-2985).[27]

C. A Uniform Cost Structure Is A Prerequisite For An Effective Interstate Trading System.

More importantly, EPA's methodology was developed so that it could be easily and effectively implemented within the structure of the national power system.[28] EPA applied its cost considerations uniformly across the upwind states to allow covered sources within upwind states to determine how best to meet required reductions. Covered sources could comply by operating existing controls, retrofitting units, switching to less polluting fuels or purchasing allowances in the market from more controlled sources. In this way, the Transport Rule could accomplish the necessary reductions required by the Good Neighbor Provision in a cost-effective manner.

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27. EPA retained the $500 figure for Group 2 states which could make the necessary reductions using less costly available controls. Notably, EPA determined that the two groups could not trade in each other's allowances, as they were based on separate cost benchmarks. App. 386a-387a, 425a.

28. In promulgating CAIR, EPA concluded that electric generation units "are part of a highly interconnected electricity grid that makes utilization shifting likely and even common. The units are large and offer the same market product (*i.e.*, electricity), and therefore the units that are least expensive to operate are likely to be operated as much as possible. If capped and uncapped units are interconnected, the uncapped units' costs would tend to decrease relative to the capped units, which must either reduce emissions or use or buy allowances, and the uncapped units' utilization would likely increase." 70 Fed. Reg. at 25,256.

EPA's methodology is the approach most likely to yield cost-effective reductions necessary to reduce emissions across the sector and across state borders. By using uniform cost benchmarks, EPA maximized both the flexibility and cost-effectiveness of the Transport Rule. The cost assumptions used by EPA were surrogates for anticipated allowance costs. If EPA were to use different cost assumptions for each state, the price of allowances would be different in each state — unless those allowances could be purchased by out-of-state power plants, in which case the price would be bid higher. For example, if Pennsylvania's budget were determined based on a $500 allowance price, and Ohio's was based on a $400 allowance price, Ohio would have a proportionately higher cap, and therefore more plentiful allowances, each representing a theoretical $400 investment in control. Pennsylvania sources would rush to buy Ohio allowances in lieu of reducing their own emissions at a real cost of $500 per ton, and Pennsylvania would not reduce its *actual* emissions to the degree predicted.

By using uniform cost benchmarks, EPA is able to accommodate some degree of interstate allowance trading, which increases flexibility, promotes the liquidity of the allowance market, lowers compliance costs and better assures compliance with the statutory air quality mandates. Were EPA unable to employ a market-based national approach because, for example, costs were not uniform but different for each state, EPA would have little alternative but to prohibit interstate allowance trading, or even to establish specific limits on sources within upwind states. *See infra*, Argument, III.C. Such a limitation would likely result in more extensive and costly controls, with less flexibility for state implementation, and in even

greater possibilities for over-control than feared by the court of appeals. *See* App. 34a-35a. EPA clearly had the discretion to interpret "contribute significantly" in such a manner as to ensure the most feasible and cost-effective solution. *See, e.g., Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (in considering a Clean Water Act "best technology available" standard, the term could be used to describe the technology that is "most efficient[].").

D. The Transport Rule Presents A Viable, Predictable Template For Reduction Of Interstate Transport To Meet Evolving Air Quality Standards.

In promulgating the Transport Rule, EPA created a program that would ensure the most cost-effective reductions necessary to implement the Good Neighbor Provision, consistent with the Act and prior D.C. Circuit directions. *See* App. 418a-422a, 576a-582a. The *North Carolina* court particularly instructed EPA to secure meaningful reductions in an expeditious manner to help downwind states achieve air quality standards set five to fifteen years earlier, and so to protect public health. *North Carolina*, 531 F.3d at 911-912, *reh'g granted*, 550 F.3d at 1177-1178. EPA intended its methodology not only to be consistent with the Act and legal precedent, but also to serve as a precedent for "quantifying upwind state emission reduction responsibilities with respect to potential future NAAQS." App. 138a, *see id.* at 310a, 314a.

Although the Transport Rule addresses compliance with the 1997 8-hour ozone, 1997 annual $PM_{2.5}$ NAAQS and 2006 24-hour $PM_{2.5}$ NAAQS, EPA was well aware of the possibility that those standards would be made

more stringent in the future. The Act requires that EPA regularly review and revise NAAQS to ensure air quality protection, 42 U.S.C. § 7409(d)(1), and in fact, on January 15, 2013, EPA issued a new annual $PM_{2.5}$ standard that significantly tightened the current standards. 78 Fed. Reg. 3086 (Jan. 15, 2013). Similarly, EPA strengthened the NAAQS for 8-hour ozone in 2008 and is currently developing a new ozone standard that will most likely be more stringent than the prior standards. App. 132a-133a; 75 Fed. Reg. 2938 (Jan. 19, 2010) (proposed revision to ozone standard); *see also, Notice of Availability of Integrated Science Assessment for Ozone and Related Photochemical Oxidants*, 78 Fed. Reg. 11,172 (Feb. 15, 2013). Ensuring that states comply with the Good Neighbor Provision will remain a challenge and could become more difficult for EPA in the coming years as air quality standards are revised.

Following the court of appeals decision below, the Agency is left with limited ability to address interstate pollution in a cost-effective way for the relevant NAAQS now in place and will face the same problem for newly-issued and future NAAQS. *See infra*, Argument, III.C. Indeed, EPA will likely be forced to abandon a regional market-based program of the type preferred by Congress and employed for nearly twenty years, and to fulfill its mandate through a costly, inflexible command-and-control approach. *See* EPA Petition for Certiorari at 30 (acknowledging that any regulatory approach following the dictates of the court of appeals "would likely be much more costly and burdensome in its application to certain States.") Such a result would be particularly harmful to the power industry to which Respondents belong, which has universally preferred lower cost

market approaches to more expensive and less flexible regulatory approaches. EPA's cost-based interpretation of "contribute significantly" is fully consistent with the statute, past practice and case law, and should be upheld to allow effective implementation of the Good Neighbor Provision now and in the future.

III. THE COURT OF APPEALS ERRED IN EXCEEDING THE BOUNDARIES ON ITS JURISDICTION SET BY THE CLEAN AIR ACT AND *CHEVRON*, AND IMPOSED REQUIREMENTS THAT ARE TECHNICALLY INFEASIBLE AND CONFLICT WITH THE CONGRESSIONAL PREFERENCE FOR MARKET-BASED REGULATORY PROGRAMS.

A. The Court Of Appeals Failed To Apply The Standard Of Review Set Forth In The Act And In *Chevron*.

Although the court of appeals cited both *Chevron* and Section 307(d)(9) of the Clean Air Act, 42 U.S.C. § 7607(d)(9), it is by no means clear how the court applied the standard of review prescribed by these authorities. App. 29a-30a, n.17. The court cited the Act's judicial review provision just once, in a footnote. *Id.* As for its *Chevron* analysis, the court made no finding as to whether the Good Neighbor Provision is ambiguous, but, in fact, appears to have founded its decision on its own competing interpretation of statutory language. *See, e.g.*, App. 22a. This failure to address the issue of ambiguity is particularly strange in light of the prior holdings of the same court on the same point in *Michigan* and *North Carolina*. *See Michigan*, 213 F.3d at 674, 677-79; *North Carolina*, 531 F.3d at 916-917 (declining to disturb EPA's

methodology). Had the court found the statutory text to be ambiguous, it would unavoidably have proceeded to the next inquiry required by *Chevron:* whether the Transport Rule is reasonable and permissible under law. However, the court appears never to have evaluated the Transport Rule under *Chevron* Step 2; it neither asks nor answers the question of whether EPA's interpretation of "contribute significantly" or "interfere" is reasonable.[29] In fact, the court seems to have eschewed "reasonableness" as a guiding principle altogether. Stating: "Congress did not authorize EPA to simply adopt limits on emissions as EPA deemed reasonable," App. 2a, the court went on to substitute its own interpretations of statutory text for those of EPA.

Instead of following the direction laid out by the statute and this Court, the court of appeals found that the Transport Rule runs afoul of three criteria the court purported to derive from "the statute's text and [the court of appeals'] decisions in *Michigan* and *North Carolina*[.]" App. 22a. The court's analysis, however, "rests on reasoning divorced from the statutory text." *Massachusetts, et al. v. EPA*, 549 U.S. 497, 532 (2007). Indeed, the court's textual analysis is, at best, minimal. The court begins with a truism (pollution must reach a downwind state to "contribute" (App. 23a)), follows with a circular argument (whether an upwind state "contributes significantly" "depends on the relative contribution of that upwind State, of other upwind State contributors, and of the downwind State itself" (App. 24a)), and finally abandons any specific reference to statutory text at all

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29. This failure contrasts with the court of appeals' explicit reference to *Chevron* as applied to the SIP/FIP issue, albeit in another cursory footnote. App. 55a, n.32.

("to conform to the text of the statute, EPA must also ensure that the combined obligations of the various upwind States, as aggregated, do not produce more than necessary 'over-control'" (App. 27a)).

Had the court of appeals properly fulfilled its role prescribed by this Court in *Chevron* and more recently in *City of Arlington*, or followed its own prior rulings, the court would have inevitably concluded that EPA's interpretation and implementation of the Good Neighbor Provision were reasonable, regardless of whether the judges would have preferred that EPA create a floor for reductions, or establish a proportionality requirement, or more rigorously avoid "over-control." *See City of Arlington*, 133 S. Ct. at 1868 ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency") (citation omitted); *Am. Elec. Power Co. Inc., et al. v. Connecticut, et al.*, 131 S. Ct. 2527, 2539 (2011) (on complex scientific and technical matters, EPA is the "first decider" in the case and the courts the second); *Chevron*, 467 U.S. at 843 (court should not "impose its own construction on the statute").

B. The Three Requirements Created By The Court Of Appeals Are Unjustified And Impracticable.

The wisdom of the *Chevron* rule is that it consigns expert tasks to the expert agencies chosen by Congress, and empowers those agencies to implement the law in harmony with Congressional intent. Here, the court of appeals wrested that authority from EPA, but lacked the knowledge and expertise necessary to fulfill the mission which Congress assigned to EPA. Without the agency's expertise and resources, the court of appeals

unwittingly invented constraints that effectively prohibit EPA from using a market-based approach to fulfill its Congressional mandate to address interstate pollution transport when states fail to meet their Good Neighbor Provision obligations. Indeed, the court of appeals' "red lines" could make any approach other than command-and-control impossible. Moreover, the court of appeals' Threshold, Proportionality, and Over-control Constraints have no basis in the Act, and cannot be met simultaneously in the real world.

Threshold Constraint. The Threshold Constraint — EPA may not require a state to reduce its contributions below 1% of the NAAQS — ignores the reality that many upwind states contribute small amounts of pollution to each downwind state, but that these small amounts must also be addressed in order to eliminate Downwind Impacts. In its Screening Analysis, EPA identified states that contribute at least 1% of the standard at any point where a downwind state fails to achieve NAAQS, or where long-term NAAQS compliance is at risk, so as to screen out only those states that do not meet this threshold at any point. The threshold was not used to determine "amounts" that "contribute significantly" to Downwind Impacts. *Compare* App. 310a-392a *with* App. 30a-31a.

Petitioners argue, and Respondents agree, that the court of appeals lacked jurisdiction to consider whether the Act imposes the Threshold Constraint. However, even assuming it was appropriate to consider the question, the court's analysis is fraught with error. Among other things, the court overlooked the critical distinction between a state that does not exceed the threshold *anywhere*, and a state that exceeds the threshold at *some* downwind

locations, but has smaller, sub-threshold contributions to many other downwind areas. App. 34a-38a. As a result, the court muddies the waters with an oversimplified pronouncement: "If amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more." App. 37a. It is unclear whether the court of appeals found that the Act prohibits EPA from requiring a state to reduce its *maximum contribution* below the 1% threshold, or prohibits EPA from requiring a state to reduce its contribution *to any location* below the threshold. If the former, as Petitioners argue, there is no evidence in the record that the Transport Rule fails to comply, so the constraint is unnecessary and unjustified. If the latter, however, the court's mandate is completely inconsistent with the fact patterns that prevail in the real world.

For example, EPA identified 21 states that contribute more than 1% of the standard (0.35 $\mu g/m^3$) to eight downwind states where concentrations exceed the 24-hour $PM_{2.5}$ NAAQS (35 $\mu g/m^3$).[30] Each of these 21 states contributes a different amount to each nonattainment area. Maryland, for example, contributes barely over 1% of the NAAQS (0.36 $\mu g/m^3$) to the nonattainment area in Cuyahoga County, OH, but contributes over 8% of the NAAQS (2.84 $\mu g/m^3$) to the one in Lancaster County, PA. *Id.* If EPA required Maryland to do no more than halve its contribution to Lancaster County, Maryland's contribution to Cuyahoga County would be reduced well

30. *See* EPA's *Air Quality Modeling Final Rule Technical Support Document*, Appendix D-11 to D-12 (2011) (C.A. App. 2710-11) ("*Air Quality TSD*"), which was part of the administrative record for the Transport Rule.

below the 1% floor, in violation of the court of appeals' Threshold Constraint. *See* App. 34a-38a.

Theoretically, EPA might be able to satisfy the court of appeals' Threshold Constraint, thus interpreted, reducing Maryland's contribution to Lancaster County without materially reducing Maryland's contribution to Cuyahoga County, by imposing limits on specific power plants in Maryland, provided that different Maryland facilities affect the two nonattainment areas. However, the court of appeals also held that EPA lacks authority to prescribe individual facility limits in the first instance, and must initially go no farther than giving states emission budgets to incorporate into their SIPs. App. 42a-45a. With no more refined tool at its disposal than its budget-fixing power, EPA cannot honor the Threshold Constraint while assuring that each upwind state's maximum contribution is reduced to the extent required to eliminate Downwind Impacts.

Proportionality Constraint. The court's Proportionality Constraint — emission budgets must "be allocated among the upwind States in proportion to the size of their contributions to the downwind State's nonattainment" — is likewise impossible to find in any statutory text, or to accommodate in the real world. App. 25a. The court's examples to "illustrate the point" are grossly oversimplified, and the court's invention of the term "NAAQS Units" reveals a profound misunderstanding of the problem EPA is trying to address and the nature of the relevant pollutants. App. 26a-27a. As a simple matter, air quality standards are measured in *concentrations* (micrograms per cubic meter of air), while emissions are measured in mass (tons per year, or

pounds per unit of fuel).[31] Neither are simply measured in "units" of compliance. More fundamentally, however, the court of appeals failed to recognize that the emissions regulated by the Transport Rule — NO_x and SO_2 — are not the same pollutants as the standards the Rule is designed to achieve. NO_x and SO_2 from power plants in multiple states contribute to violations of the ozone and $PM_{2.5}$ NAAQS only after long-range distribution, intermingling, photochemical reactions and other vagaries of atmospheric chemistry which EPA considered as part of its analysis.

The court of appeals ignored this complex reality when it suggested that a specific number of compliance "units" could simply be identified from each upwind state, without understanding the impact of these other variables. There is no static, linear correlation between the pollution emitted upwind (measured in tons of NO_x or SO_2 per year) and the concentrations experienced downwind (measured in micrograms per cubic meter or parts per billion, averaged over periods as short as eight hours). *See generally*, 75 Fed. Reg. 45, 210, 45,234-237 (Aug. 2, 2010). The court of appeals would require EPA to evaluate proportionality at a single, isolated point in time, but the constantly changing nature of emissions and Downwind Impacts over time makes such an effort unrealistic and overly rigid. The court's simplistic analysis fails to capture the dynamic challenge that EPA faces.

Contrary to the court's examples, each nonattainment area is affected by multiple upwind states, most of which also contribute to other areas in differing proportions. If

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31. The court of appeals misread the term "amounts" to mean downwind concentrations. Congress very well knew how to designate contributions to "concentrations" and to specify those, as it did in section 163 of the Act. 42 U.S.C. § 7473.

EPA meets the court's Proportionality Constraint for one nonattainment area at one point in time, it will necessarily run afoul of this requirement at every other area to which the same upwind states contribute. This problem is readily apparent from the administrative record. For example, Illinois, Indiana and Ohio each contribute to Downwind Impacts in Milwaukee, WI and Brooke County, WV.[32] Illinois and Indiana contribute roughly equal amounts of pollution to Milwaukee (about 25% of the NAAQS), while Ohio contributes less (about 15%). *See Air Quality TSD* (C.A. App. 2710-11). To follow the court's directive, EPA would have to develop budgets for Illinois and Indiana that reduce their contributions to Milwaukee by about the same amount, and a budget for Ohio requiring smaller reductions. App. 26a-27a. The court of appeals would also require that EPA's budgets for these states reduce proportionately those states' contributions to Brooke County, as well. *Id.* However, Illinois (6%), Indiana (13%), and Ohio (45%) contribute to nonattainment in Brooke County in dramatically different proportions. Figure 1 is a chart derived from data in EPA's *Air Quality TSD*, Appendix D, and illustrates that the court of appeals mandates what is mathematically impossible: that EPA devise budgets for Illinois, Indiana and Ohio that are both in a ratio of 5:5:3 and in a ratio of 1:2:6. (C.A. App. 2628-2635, 2710-2711). This example is typical of the problem of interstate pollution transport, and why EPA reasonably chose a method that would achieve a more rational allocation of responsibility among the upwind states.

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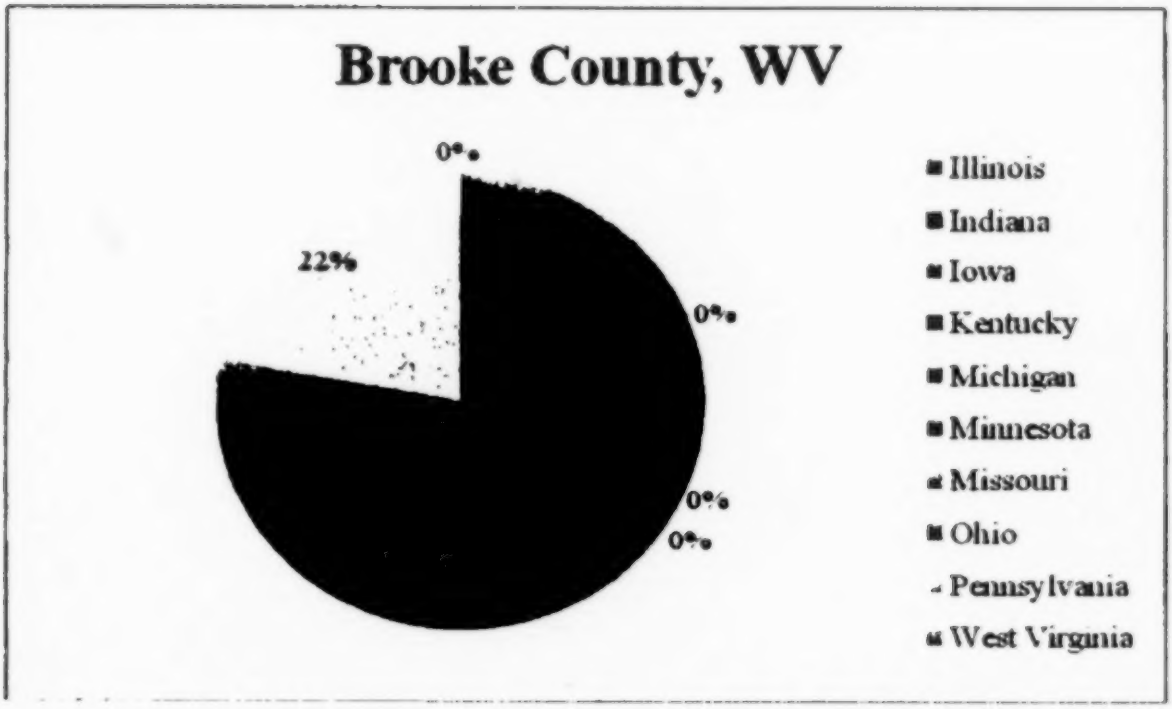
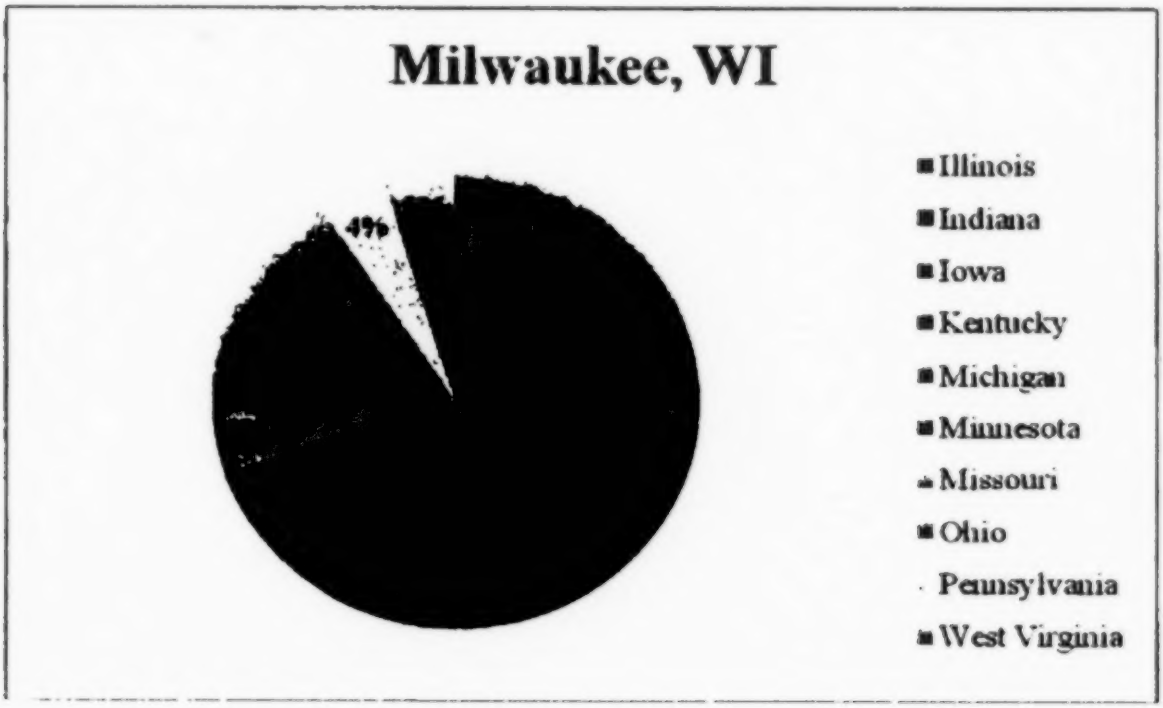
32. Typical of interstate transport, the real picture is far more complicated than even these examples show. The Milwaukee, WI nonattainment area receives contributions from 27 states, ten of which contribute more than 1% of the 24-hour $PM_{2.5}$ NAAQS. *See Air Quality TSD* (C.A. App. 2710-11). The Brooke County, WV nonattainment area receives contributions from 30 upwind states, six of which exceed the 1% threshold. *Id.*

FIGURE 1


Brooke County, WV
0%
22%
0%
0%
0%
Illinois
Indiana
Iowa
Kentucky
Michigan
Minnesota
Missouri
Ohio
Pennsylvania
West Virginia


Milwaukee, WI
4%
Illinois
Indiana
Iowa
Kentucky
Michigan
Minnesota
Missouri
Ohio
Pennsylvania
West Virginia

Contradicting its finding that the Proportionality Constraint, found nowhere in the statute, is a "red line" requirement of the statutory text (App. 24a-27a), the court of appeals explained that EPA has discretion to disregard this boundary when necessary to satisfy the Over-control Constraint. App. 28a-29a. The court certainly did not afford EPA any such discretion when reviewing EPA's determination of "contribute significantly," and failed even to discuss the agency's rationale for considering but rejecting a proportionality rule.[33] Further, the court's acknowledgement that some disproportionality may be unavoidable gives the agency neither clear authority nor helpful guidance on whether or when it can determine it is "safe" to disregard the Proportionality Constraint in favor of other, perhaps "more statutory," imperatives. More immediately, this concession does not solve the unsolvable mathematical problem described above that the court of appeals has imposed on EPA.

Over-control Constraint. The third requirement the court of appeals coaxed from the Act's text is the Over-control Constraint — state budgets must "not

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33. EPA considered a proportionality element among several policy alternatives in the rulemaking, but concluded, in its expert judgment, that a requirement similar to that ultimately imposed by judicial fiat would be neither feasible nor cost-effective. The court of appeals only fleetingly referred to this important fact in a footnote, without explaining why EPA's conclusion was not reasonable. *See* App. 40a n.24 (citing EPA, *Alternative Significant Contribution Approaches Evaluated Technical Support Document* (July 2010) (C.A. App. 2311-12)). It appears that this approach was neither advocated or asserted to be required by commenters and none took issue with EPA's approach in this regard. *See* App. 97a-101a, 111a-112a (Rogers, J., dissenting).

produce more than necessary 'over-control' in the downwind States." App. 27a. However, the court did not answer the question, "More than necessary...for what?" The court's opinion admits a number of equally plausible interpretations of this murky mandate: more than necessary to attain the standard at the area most affected by the state; more than necessary to attain the standard at all areas affected by the state; more than necessary to maintain compliance after the standard is achieved; more than necessary to reduce the state's maximum contribution to the 1% threshold; more than necessary to reduce the state's emissions in proportion to those of other states, etc.[34] Without further clarification, the court's term "necessary" is no more helpful than the statute's term "significant."

As a practical matter, emissions throughout the Transport Rule region are so inseparably intertwined that it is difficult to see how EPA could satisfy this Over-control Constraint regardless of the interpretation used. For example, Ohio, West Virginia, Pennsylvania and Indiana are the four largest contributors to five different nonattainment areas in three states. Figure 2 shows the modeled concentrations before and after implementation of the Transport Rule. *Air Quality TSD* (C.A. App. 2628-35, 2710-11). After full implementation of the rule, one of these areas (Allegheny, PA 420030064) will remain far above the

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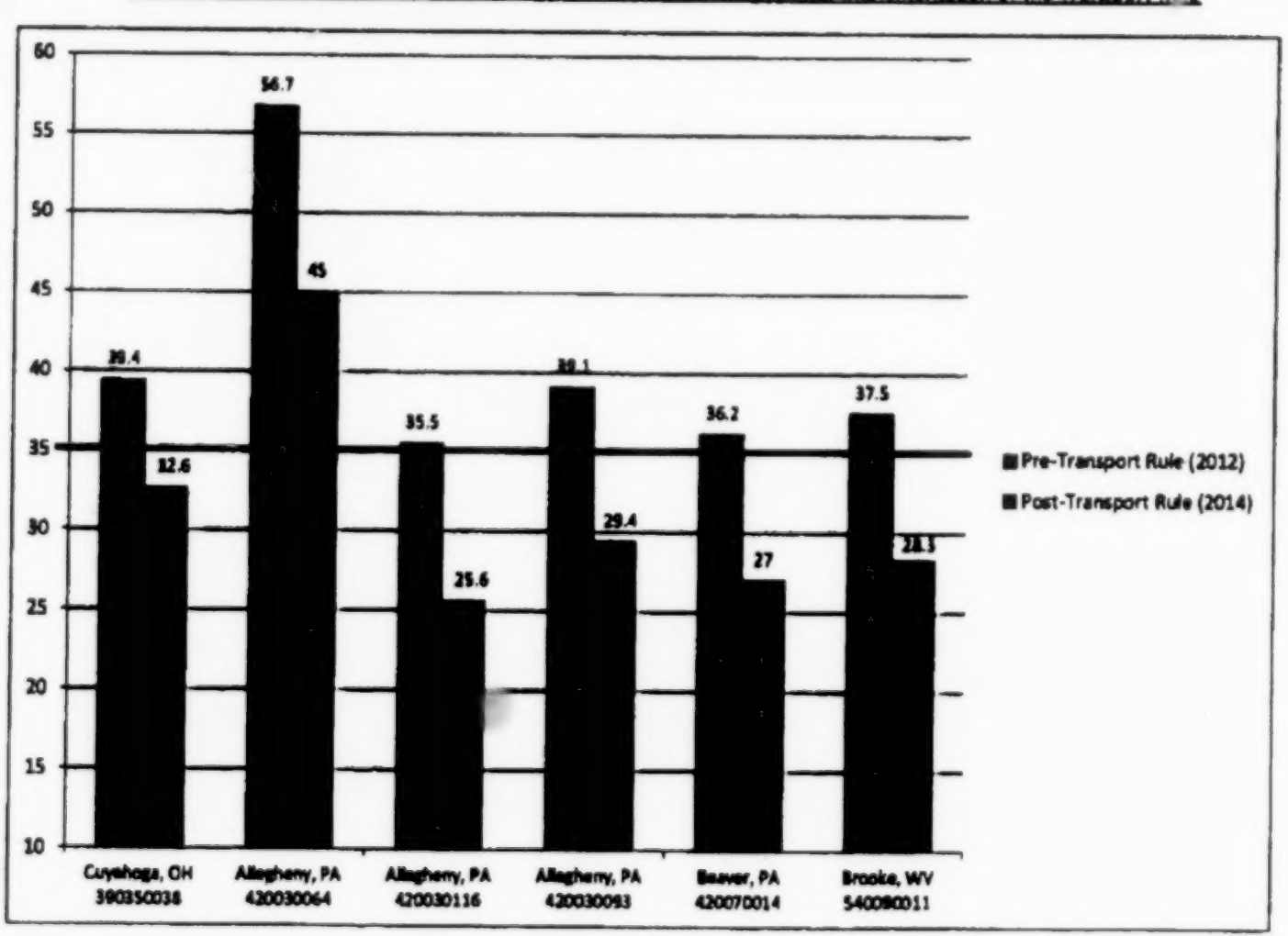
34. The most benign interpretation — that the state's budget cannot require reductions beyond what is necessary to attain compliance at all locations affected by the state — is addressed by Petitioners, who note that this particular concern is entirely hypothetical. Even after complete implementation of the Rule, there will still be some areas in nonattainment. App. 312a-316a; *Air Quality TSD*, Appendix B (C.A. App. 2546-2637).

FIGURE 2


24-Hour PM2.5 Design Values (ug/m3) for Downwind Areas Before and After Implementation of the Transport Rule
60
55
50
45
40
35
30
25
20
15
10
39.4
32.6
56.7
45
35.5
25.6
39.1
29.4
36.2
27
37.5
28.3
Pre-Transport Rule (2012)
Post-Transport Rule (2014)
Cuyahoga, OH
390350038
Allegheny, PA
420030064
Allegheny, PA
420030116
Allegheny, PA
420030093
Beaver, PA
420070014
Brooke, WV
540090011

air quality standard and one (Cuyahoga, OH 390350038) will narrowly achieve the standard. The others, however, will achieve the standard by a comfortable margin, and might represent the sort of "over-control" that the court of appeals found to be prohibited by the Act. If EPA were to relax the requirements on these four states to avoid this "over-control," air pollution would be even farther above the standard at the Allegheny receptor, and would rise above the razor-thin margin of compliance at the Cuyahoga receptor.

Taken all together, the Threshold, Proportionality and Over-control Constraints weave an impassible thicket for EPA to navigate using only its budget-fixing authority. Focusing only on opportunities to fulfill its perceived requirement that EPA relax the emission reduction obligations of upwind states, the court of appeals lost sight of the fundamental goals of the Act — to promote cleaner air — and the Good Neighbor Provision — to provide relief within our federal system for downwind states.[35]

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35. Although the court of appeals found that EPA lacks the authority to adopt a program that would result in air that is cleaner than the NAAQS, this is not true. The Good Neighbor Provision also requires that State Implementation Plans prohibit pollution that would "interfere with measures required to be included in the applicable implementation plan for any other State [under those sections] to prevent significant deterioration of air quality or to protect visibility." 42 U.S.C. § 7410(a)(2)(D)(i)(II). The "prevention of significant deterioration" program is designed to prevent the degrading of air quality in areas that already meet air quality standards. *Id.* §§ 7471-7492. EPA cannot meet that mandate if its regulation cannot address upwind contributions beyond those necessary merely to attain and maintain the NAAQS. Prevention of "over-control" is also inconsistent with the many technology-forcing requirements of the Clean Air Act, which

C. The Court Of Appeals' Extra-Statutory Constraints Bar EPA From Addressing Interstate Pollution With A Market-Based System.

Even assuming that the court's three constraints could theoretically be met and otherwise comport with the Act, these requirements effectively bar EPA from utilizing any market-based system to address interstate pollution from the electric power industry, contrary to clear expressions of Congressional intent and EPA's long-established implementation of the Good Neighbor Provision. As noted above, Congress determined market-based programs to be the most appropriate method for addressing the problem of interstate air pollution from the power industry when it created the Title IV Acid Rain Program and specifically authorized the use of market-based approaches under Title I of the Act to achieve and maintain compliance with NAAQS because market-based programs promote environmental improvement with maximum economic efficiency. *See supra*, Statement of the Case, III. Utilizing this authority, EPA created vibrant trading programs under the NO_x SIP Call and CAIR to address interstate pollution.

The court of appeals discarded without discussion EPA's complex technical analysis which incorporated economics, market structure and atmospheric pollution transport modeling, and instead substituted its own judgment, based primarily on oversimplified and unrealistic hypotheticals.

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seek to drive new technologies that will clean up the air beyond the minimum required to meet NAAQS or other risk-based air quality standards. *See id.* §§ 7411, 7412.

In order to develop a market-based program that satisfies the Threshold, Proportionality and Over-control Constraints, assuming that it is theoretically possible to do so at all, EPA would have to adjust incrementally each state's budget by adjusting the control cost used for each state. Thus, while EPA used a control cost of $500 per ton of emissions as a starting point in all states, EPA would need to use a lower control cost in some states (relaxing their budgets) to attempt to tune each state's budget to comply with the court of appeals' three constraints. Notably, the court of appeals would prohibit EPA from tuning a budget in the other direction, using higher control costs in certain states, resulting in more restrictive budgets. App. 11a.

Such an approach based on different control costs for each state effectively prohibits a market-based program relying on interstate allowance trading, like the Transport Rule and all of its predecessors. For example, if EPA established State A's budget using a $500 control cost, but State B's budget using a $400 control cost, EPA would predict higher reductions in State A than in State B. Because electric generation is fluid, EPA would expect that the higher control costs in State A would either cause plants to operate controls costing $500 or less, or shift generation from State A to State B, reducing emissions in State A. However, if power plants in State A could purchase $400 allowances from plants in State B rather than incurring $500 in costs to operate their controls, they would do so. As a result, State A would effectively "lose" $100 worth of emission controls, and might exceed its *actual* emission budget, regardless of whether each power plant in the state meets its obligation to surrender

allowances. If EPA cannot ensure that each state will stay within its budget, EPA cannot predict whether its Downwind Impacts will be eliminated. When EPA used different SO_2 control costs in two groups of states (Group 1 and Group 2), it prohibited trading between those groups of states to ensure that emission reductions occur in the states where they are needed. *See supra*, note 27. If EPA were to adjust incrementally the cost benchmarks used for each state in order to satisfy the court of appeals' constraints, interstate trading would also have to be prohibited.

The court of appeals thus effectively stripped EPA of the primary tool that the agency has used to address the intractable problem of interstate air pollution. The court of appeals found in *Michigan* that EPA's interpretation of the Good Neighbor Provision is reasonable, and neither the Act nor *Michigan* nor *North Carolina* nor any other authority suggests that EPA fundamentally erred in choosing the Transport Rule's market-based system as a remedy. While the court of appeals characterized its holdings as extensions or clarifications of these earlier decisions, the practical consequences of its holdings are entirely inconsistent with the Act, with the Congressional preference for market-based systems, and with the court of appeals' prior endorsement of EPA's fundamental market-based approach.

CONCLUSION

Respondents Calpine Corporation and Exelon Corporation respectfully request that the Court reverse the decision of the court of appeals and reinstate the Transport Rule.

Respectfully Submitted,

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RESPONDENT'S BRIEF

Nos. 12-1182, 12-1183

U.S.
DEC - 3 2013

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF RESPONDENTS CALPINE CORPORATION AND EXELON CORPORATION IN SUPPORT OF PETITIONERS

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RULE 29.6 DISCLOSURE STATEMENT

The corporate disclosure statement for Calpine Corporation and Excelon Corporation was set forth at page (ii) of their opening brief and there are no changes to that statement.

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Respondents Calpine Corporation and Exelon Corporation respectfully submit this reply brief in support of Petitioners United States Environmental Protection Agency, *et al.* ("EPA"), and American Lung Association, *et al.* ("ALA").

INTRODUCTION

Mischaracterizing the nature of the Good Neighbor Provision of the Clean Air Act ("Act"), 42 U.S.C § 7410(a)(2)(D), respondents in opposition ("Respondents") analyze the Good Neighbor Provision as if it were a narrow grant of authority to EPA. However, Congress addressed the Good Neighbor Provision to a different audience – the States – and the obligations imposed by it are but of few of the many obligations that States must address in their State Implementation Plans ("SIPs") under Section 110(a)(2) of the Act, 42 U.S.C § 7410(a)(2). Congress assigned to EPA the task of determining whether implementation plans meet the minimum requirements of the Act, and EPA's determinations are entitled to deference, including its determination that the Transport Rule (76 Fed. Reg. 48,208 (Aug. 8, 2011) (App. 117a-1458a)) would have failed to meet those requirements had EPA required less of the States subject to the Rule.

Congress expressly authorized States to fulfill their SIP obligations by creating "economic incentives" which necessarily rely on cost, and the Act is replete with other authorizations to consider cost. When implementing the Good Neighbor Provision on behalf of defaulting States, EPA is certainly authorized to employ the same means available to the States. Respondents do not identify any statutory text that prohibits the use of cost to define

emission reduction obligations under the Good Neighbor Provision. Likewise, neither Respondents nor the majority below offer textual support for the proposition that EPA may consider cost only to relax the obligations of States.

The Transport Rule reflects a measured and thoughtful approach that recognizes the unique nature of the electric generation industry. The Rule imposes on States only the minimum requirements necessary to satisfy the Good Neighbor Provision, while implementing a system that will satisfy the explicit mandate of the Good Neighbor Provision to reduce interstate pollution. Neither the law nor the facts support Respondents' complaints of "overcontrol." EPA was required to make the economic incentives at work in the Transport Rule sufficient to motivate actual emission reductions. Emission reductions come at a predictable cost, and until the value of the incentive to reduce pollution exceeds that cost, there will be no actual reductions in pollution. While Respondents clamor that EPA should have required less of some States and more of others, the reality is that each additional cost distinction between States would create market barriers that would reduce the overall effectiveness of the program and raise costs for all participants. EPA was well within its rulemaking authority to disregard trivial, even hypothetical, cost distinctions among States in order to create an effective, efficient market that works within the context of the electric generation industry to produce the emission reductions demanded by the Good Neighbor Provision.

The Court should reverse the decision of the court of appeals and reinstate the Transport Rule.

ARGUMENT

I. RESPONDENTS' INTERPRETATION OF THE GOOD NEIGHBOR PROVISION IGNORES ITS CONTEXT WITHIN THE ACT.

The central theme struck by Respondents and the majority below regarding the substance of the Transport Rule is that EPA went too far, imposing requirements on States that exceed the authority conferred on EPA by Congress. These arguments, though, are based on grandiose extrapolations from statutory text that Congress neither addressed to EPA in the first instance, nor wrote in a way that is amenable to interpretation as an upper bound on the authority of EPA to regulate air pollution when States fail to meet their obligations under the Act.

Respondents minutely parse a single clause of the Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), to extract what they contend are clear Congressionally-designed limits on EPA's authority to impose measures to enforce that provision when States do not. Their analysis, however, ignores the context of the Good Neighbor Provision, and indeed all of Section 110, and its place in the statutory scheme of the Act. Section 110(a)(2), which includes the Good Neighbor Provision, establishes a floor for States – a litany of minimum requirements that States must impose in their implementation plans in order to comply with the Act. Yet, Respondents ask this Court to construe the Good Neighbor Provision not as a floor for State obligations, but as a ceiling on EPA's authority. *See, e.g.*, Brief of Industry and Labor Respondents (ILR Br.) 23. The statute was simply not written this way. Section

110(a)(2) describes the types of measures that must, *at least*, be included in SIPs using open-ended language requiring subjective interpretation. There is not a single clause *limiting* the authority of States or EPA to regulate air emissions.

While Congress did not address Section 110(a)(2) to EPA as the primary audience, it did establish a mandatory role for EPA that this Court must heed. Congress defined State obligations in Section 110(a)(2) in terms clearly demanding interpretation, requiring control measures "as may be necessary or appropriate" to comply with the Act (42 U.S.C. § 7410(a)(2)(A)), enforcement programs "as necessary to assure" compliance with air quality standards (*id.* § 7410(a)(2)(C)) and, in the case of the Good Neighbor Provision, "adequate provisions" to prohibit the interstate air pollution that is the subject of the Transport Rule (*id.* § 7410(a)(2)(D)). *See also, id.* §§ 7410(a)(2)(B) (requiring "appropriate" and "necessary" monitoring devices); 7410(a)(2)(E) ("necessary" assurances of "adequate" State authority and resources); 7410(a)(2)(G) ("adequate" contingency plans to implement emergency authority). Congress enshrined EPA as the expert agency with the duty and authority to interpret these terms and so to decide whether the measures proposed by a State are indeed "necessary," "appropriate" and "adequate" to meet the minimum requirements of Section 110(a)(2). *Id.* § 7410(k); *Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975). This Court and others have long recognized that EPA is the proper arbiter of the adequacy of SIPs, and is entitled to deference when it determines that a plan meets the minimum standards of the Act, or that it does not. *Train*, 421 U.S. at 79; *Oklahoma, et al. v. EPA*, 723 F.3d 1201, 1204, 1207 (10th Cir. 2013); *Luminant Generation Co.*

LLC, et al. v. EPA, 714 F.3d 841, 856-58 (5th Cir. 2013); *Michigan Dept. of Envtl. Quality, et al. v. EPA*, 230 F.3d 181, 185 (6th Cir. 2000).

When EPA is compelled to step into the shoes of a State and to promulgate a federal implementation plan under Section 110(c)(1), 42 U.S.C. §7410(c)(1), EPA remains the agency charged by Congress with determining what is minimally necessary to fulfill the requirements of Section 110(a)(2), including the amounts of pollution from upwind States that "contribute significantly" to or "interfere with" downwind States' inability to achieve or maintain air quality standards. Likewise, EPA remains entitled to the same deference with respect to its federal plan that courts afford the Agency when it determines that State submissions are adequate or inadequate. EPA determined that its plan reflected by the Transport Rule is "adequate" as required by Section 110(a)(2)(D), and rejected less restrictive measures as "inadequate." App. 189a, 354a-356a, 384a; Brief of Calpine Corporation and Exelon Corporation (Calpine/Exelon Br.) 24. This determination is squarely within the authority conferred on EPA by Congress, and the Court should afford the highest degree of deference to EPA's assessment of the nature and extent of the program necessary to satisfy the Good Neighbor Provision across the 27 States affected by the Rule, just as it would to EPA's determination of the adequacy of a State plan. *Oklahoma*, 723 F.3d at 1216-17 (deference owed "especially strong where the challenged decisions involve technical or scientific matters within the agency's area of expertise"). The Court should reject Respondents' invitation to overlook the role Congress conferred on EPA by narrowly focusing on a single clause in the Act, and reading the Good Neighbor Provision far out of context.

II. THE GOOD NEIGHBOR PROVISION ALLOWS FOR CONSIDERATION OF COST.

During the development of the Transport Rule and even through litigation of the Rule in the D.C. Circuit, no party seriously challenged EPA's authority to consider cost in establishing State emission budgets. At most, those critical of the Transport Rule argued in the litigation that EPA could only consider cost to reduce State emission reduction obligations. For the first time,[1] however, in their opposition brief, Industry and Labor Respondents assert that cost cannot be considered in implementing the Good Neighbor Provision *at all*, a claim so extraordinary that even their co-respondents, including several major electric utilities and trade groups, disagree and distinguish their position. *See* Brief of Utility Air Regulatory Group, *et al.* (UARG Br.) 5-6, 28 n.6 (listing Act provisions which allow cost considerations). Not only is this assertion not borne out by the Act or case law directly on point, but it would impose dangerous and unnecessary limits on both States and EPA when they address interstate pollution. It would also likely result in more costly regulatory burdens for the States and their sources. EPA's use of cost considerations, combined with State air quality impacts, is authorized by the Act, is consistent with prior case law, and allows the Agency to harness the electricity market to achieve the necessary reductions in interstate pollution in the most cost-effective way. *See generally* Calpine/Exelon Br. 32-42. Neither the Good Neighbor Provision nor any other provision of the Act constrains the authority of EPA or the States to consider cost in the manner applied by EPA in the Transport Rule.

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1. For this reason alone, the issue was not properly raised on appeal. *See* 42 U.S.C. § 7607(d)(7)(B), (e).

A. The Act Authorizes Use Of Cost In Implementing The Good Neighbor Provision.

By itself, the Good Neighbor Provision states nothing about the use of cost considerations one way or the other; it certainly does not "unambiguously bar[]" the practice, as Respondents wrongly assert. ILR Br. 29. Despite Respondents' efforts to find bright line limits where there are none, the phrase "contribute significantly" is ambiguous, directing EPA to make a regulatory determination as to what "amounts" of an upwind State's pollution "contribute significantly" to nonattainment of air quality standards or interfere with maintenance of standards in downwind States. *Michigan v. EPA*, 213 F.3d 663, 677-678 (D.C. Cir. 2000).[2] EPA thus has discretion to consider cost if its interpretation of its authority is reasonable under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). Indeed, EPA has interpreted the Good Neighbor Provision and its antecedents to allow for cost considerations for nearly 25 years. *See* Brief of *Amicus Curiae* Institute for Policy Integrity 17-20.[3]

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2. The State and Local respondents in opposition acknowledge the ambiguity of the Good Neighbor Provision, even as their Industry and Labor co-respondents appear to find clear and straightforward textual limits where there are none. State & Local Respondents Br. 39-40, 53.

3. *See* Stephen G. Breyer, Richard B. Stewart, Cass R. Sunstein & Matthew L. Spitzer, *Administrative Law and Regulatory Policy* 65 (4th ed. 1999) (questioning whether agency could determine if risk is "significant" without considering cost of eliminating risk) (cited in *Michigan*, 213 F.3d at 677-678.

As noted above, the Good Neighbor Provision is properly viewed as one part of the overall structure of the SIP process established under Section 110. Section 110 expressly allows use of "economic incentives such as fees, marketable permits, and auctions of emissions rights" in SIPs (and thus in federal implementation plans). *See* 42 U.S.C. §§ 7410(a)(2)(A), 7602(y); Calpine/Exelon Br. 12-15. A State cannot develop such incentive-driven, market-based programs without considering costs. Indeed, additional statutory provisions provide authority for cost consideration in addressing attainment concerns in SIPs, including for pollutants at issue in the Transport Rule. *See* 42 U.S.C. § 7511b(d) (EPA required to provide guidance to States to evaluate cost-effectiveness of various options to control emissions which contribute to nonattainment of ozone standards); *id.* § 7502(c)(6) (nonattainment plans to include economic incentives); *id.* § 7509(d) (States that fail to attain standards must submit revision which considers costs of implementation); *see* UARG Br. 5-6 (citing many of same provisions for the assertion that EPA and States can consider cost); ILR Br. 36 n.17 (citing similar provisions and acknowledging that cost can be considered in implementing but not setting EPA emission budgets). Significantly, none of the provisions listed above purport to *limit* the use of cost in only one direction, *i.e.* only to lower reduction obligations.

Therefore, there is no clear statutory bar to the use of cost considerations in implementing the Good Neighbor Provision just as there are no such bars – and in fact there is explicit encouragement – for States and EPA to consider cost when addressing nonattainment. EPA's authority to consider cost in the very way utilized by EPA in the Transport Rule has been tested in the courts.

See Michigan, 213 F.3d at 676-680 (rejecting argument that cost cannot be considered under the Good Neighbor Provision and upholding EPA's use of uniform control costs in determining "significant contribution"); *North Carolina v. EPA*, 531 F.3d 896, 917 (D.C. Cir. 2008) (citing *Michigan* and approving of EPA's use of uniform control costs). This Court specifically referenced the *Michigan* ruling on cost consideration without any suggestion it was wrongly decided or that the D.C. Circuit improperly construed the statute. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 469 n.1 (2001). In *American Trucking*, the Court recognized the distinction in the Act between establishing air quality standards, where cost could not be considered unless clearly so provided in the Act, and implementing those standards, where cost could be considered. *Id.* at 469-470 (citing provisions enabling EPA to consider cost in assisting States to *implement* standards). *See* Calpine/Exelon Br. 34 & n.26. Respondents' argument would require the Court to reverse *Michigan*, *North Carolina* and other precedents acknowledging the role of cost in developing plans to implement Section 110, including the majority's decision below. App. 27a.[4]

American Trucking does not support Respondents' extraordinary argument. Respondents identify no "unambiguous bar" to cost considerations in the Good Neighbor Provision. *See* ILR Br. 24. Their contention that there are no "textual commitments of authority to EPA to consider costs" overlooks the explicit authority of

4. This Court also acknowledged other leading cases affirming the proposition that costs can be considered under the Act except where specifically prohibited. *See American Trucking*, 531 U.S. at 469 n.1.

Section 110(a)(2)(A) and other relevant provisions of the Act. *Id.* The provisions cited above provide numerous examples of Congress authorizing the States and EPA to consider economic incentives, including cost-based market mechanisms, when implementing SIPs or otherwise addressing nonattainment in the SIP process. If the Court were to endorse Respondents' view, neither States nor EPA could ever consider cost in implementing SIPs and seeking attainment unless Congress explicitly authorized cost considerations in every relevant provision. This Court, though, has recognized that "[i]t would be impossible to perform that task [developing SIPs] intelligently without considering which abatement technologies are most efficient, and most economically feasible –which is why we have said that 'the most important forum for consideration of claims of economic and technological infeasibility is before the State agency formulating the implementation plan.'" *American Trucking*, 531 U.S. at 470 (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 266 (1976)).

Respondents' efforts to distinguish *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208 (2009), also fail. *See* ILR Br. 25-26. As EPA notes, *Entergy* demonstrates the Court's default view that it is appropriate for EPA to consider costs and benefits of regulations when implementing subjectively phrased statutory mandates, even when the statutory text contains no explicit authorization to do so. EPA Br. 44. This Court concluded that such analysis is reasonable provided the statute in question does not "unambiguously preclude cost-benefit analysis." 556 U.S. at 220. The Court found the subjective term "best technology available" to provide EPA with "discretion to determine the extent of reduction that is warranted under the circumstances." *Id.* at 219. There is no reason for the

Court to withhold similar discretion from EPA when it determines the emission reductions required to comply with the Good Neighbor Provision.

The implications of Respondents' argument are profound, and contrary to the interests of both industry and States. States have the primary and initial responsibility to implement the Good Neighbor Provision and other SIP requirements. If the text of the Good Neighbor Provision precludes EPA from implementing that provision through a cost-based program of economic incentives, the text must necessarily preclude States from doing so. In fact, contrary to this Court's understanding of the SIP implementation process, *see American Trucking*, 531 U.S. at 470, States would be precluded from considering cost unless Congress explicitly authorized such an inquiry. If cost cannot be considered, neither States nor EPA will be able to develop an effective market trading program. Calpine/Exelon Br. 3-4, 55-57.

The position advanced by Industry and Labor respondents directly undermines the authority and flexibility of the State and Local respondents, who understandably have not adopted this position in their own opposition brief. If market-based approaches are unavailable, direct command-and-control approaches would be the only means of mandating necessary emission reductions. Were such regulation to be based entirely on air quality and health impacts, with no means of assuring that emission reductions are made cost-effectively, those regulations would necessarily be more costly. Brief of *Amici Curiae* Hobbs, *et al.* (Hobbs Br.) 26-31. That is precisely why the electric generation industry generally favors such a market-based approach. *See* Calpine/Exelon

Br. 18. In fact, no party who commented on the proposed Transport Rule argued that the Act requires an "air quality only" approach. ALA Br. 30.

B. There Is No Directional Limit On States' And EPA's Consideration Of Cost.

UARG and its co-respondents take the position that cost can be considered in implementing the Good Neighbor Provision but only to "ameliorate regulatory burdens" and not to allow stronger obligations that might be required to assure necessary emission reductions, and Industry and Labor respondents adopt this as a fall-back position. *See* UARG Br. 5-6, 28; ILR Br. 36 n.17, 37. Yet, Respondents do not identify any place in which Congress unambiguously limited EPA's authority to consider cost to justifying the relaxation of a State's obligations under the Good Neighbor Provision.

None of the provisions cited by Respondents actually state that EPA can use cost only to reduce State emission reduction obligations, nor do Respondents point to any other Congressional language making such a clear distinction. UARG Br. 5-6; ILR Br. 36 n.17. Significantly, none of these references appear in Section 110 itself. Rather, they relate to consideration of cost in determining what are "reasonably available" control measures or technology for certain programs. Such usage does not inherently mean that those cost considerations may only be used to *reduce* obligations, nor do statutory references to cost-effectiveness. Reasonableness and cost-effectiveness can cut in two directions. A lower cost is neither reasonable nor cost-effective if it does not produce the necessary reductions; consideration of

cost does not mean consideration of only the lowest cost, without reference to air quality impact. EPA could just as properly conclude that a higher cost is reasonable if it achieves the necessary reduction more cost-effectively than a lower cost option, or that a State should eliminate a greater amount of emissions if it can do so more cost-effectively than another.[5]

The only support for Respondents' claim as to one-way cost consideration comes from the unsupported lower court holding under review here. *See* App. 27a. The majority cites no statutory reference for this summary holding, citing instead to *Michigan* and *North Carolina* with no discussion or even parenthetical explanation of how those decisions support such a holding. A more careful analysis of those cases reveals that neither makes any distinction between the use of cost to establish obligations and the use of cost to reduce obligations. The *Michigan* court allowed EPA to consider "highly cost-effective controls" in determining whether a given contribution by a State was "significant" under the Good Neighbor Provision. *Michigan*, 213 F.3d at 675. In doing so, it recognized EPA's ability to use cost to determine the point where a contribution would no longer be "significant" within the meaning of the Good Neighbor Provision, and thus to establish the emission reduction obligation. Presumably, EPA could make that determination at any level of cost it found applicable, which could be relatively high (EPA in

5. In fact, one provision cited by Respondents, 42 U.S.C. § 7509(d)(2), UARG Br. 5-6, ILR Br. 36 n.17, requires EPA to impose for nonattainment areas "all measures that may feasibly be implemented," based on a balancing of costs with health and environmental impacts. EPA could logically conclude that a given reduction is necessary, even if it comes at a higher cost.

that rule used $2,000 per ton of NO_x reductions), and could find that costs both below and above that figure would not be appropriate. The *Michigan* court most assuredly did not establish a principle that EPA could only use cost to relax emission reduction obligations. The *North Carolina* court merely upheld *Michigan's* holding on the use of "highly cost effective" reductions and made no distinction as to which direction cost could be considered. 531 F.3d at 918. Significantly, however, the court there found that EPA's use of cost *insufficiently protective* of downwind States. The court vacated the Clean Air Interstate Rule not because it imposed unreasonable cost on States and sources but because it failed to assure those States would make the necessary reductions in time to allow downwind States to achieve and maintain air quality standards. *Id.* at 906-908.

The limits to consideration of cost asserted by Respondents are entirely of their own invention. Like the other limits they seek to graft into the Good Neighbor Provision, these hypothetical limits "rest[] on reasoning divorced from the statutory text," *Massachusetts, et al. v. EPA*, 549 U.S. 497, 532 (2007), and lack any basis in the statute or case law construing the statute, except the opinion under review. This Court should reject the argument that the Good Neighbor Provision establishes such clear textual limits and rather should hold that EPA offered a reasonable interpretation of a statutory provision giving States and EPA the authority to determine when an upwind contribution "significantly" impacts or interferes with downwind attainment of air quality standards.

III. FAR FROM OVERREACHING, EPA'S APPROACH RECOGNIZES THE PRACTICAL CHARACTERISTICS OF THE ELECTRIC GENERATION SYSTEM.

There is nothing fundamentally illicit about EPA's choice of a market-based program to implement the Good Neighbor Provision, and much to support it. Respondents primarily claim that EPA took a legitimate, statutorily authorized approach too far, that is, that EPA required sources in some States to spend more on reducing emissions than necessary to satisfy those States' minimum obligations under the Good Neighbor Provision. This argument fails for two reasons. First, Respondents' argument is entirely hypothetical, and turns on an unspoken and factually incorrect assumption that if emissions can be reduced for a cost of $500 per ton, they can be reduced a little less for $400 or $300 or $200 per ton. Second, EPA reasonably chose to maximize the efficiency of the system by limiting the number of trading markets, allowing all States subject to the Rule to have access to the broadest and most efficient allowance markets consistent with the statutory objective of reducing interstate air pollution.

A. The Transport Rule Does Not Require Greater Reductions Than Necessary To Implement The Good Neighbor Provision.

Respondents make a number of arguments that EPA required too much of certain States and thus exceeded its statutory authority. ILR Br. 12-22; UARG Br. 18-19, 26-34. Subtle distinctions aside, all of these arguments hinge on a single claim: that the Rule exceeds EPA's authority

because it would improve air quality in some areas to such a degree that pollution levels would fall materially below air quality standards. As a threshold matter, even taken at face value this claim is no indictment of EPA. There is no prohibition in the Act against measures to make air quality *cleaner* than air quality standards.

The *whole* Good Neighbor Provision, Section 110(a)(2)(D), including clauses (i)(I) *and* (II), provides that States must prohibit emissions that would significantly degrade air quality in downwind States *in areas that are well below air quality standards, and have no history of nonattainment.* 42 U.S.C. § 7410(a)(2)(D). Respondents myopically focus only on the first clause of the Good Neighbor Provision relating to attainment and maintenance of standards, but the second clause also requires States to prohibit emissions that would interfere with any other State's programs "to prevent significant deterioration of air quality or to protect visibility." *Id.* § 7410(a)(2)(D)(i)(II) (referring to the requirements of "part C of this subchapter," §§ 7470-7492). These part C programs are required by the Act "to protect health and welfare from any actual or potential adverse effect which . . . may reasonably be anticipated to occur from air pollution . . . *notwithstanding attainment and maintenance of all national ambient air quality standards.*" 42 U.S.C. § 7470(1) (emphasis added). Thus, Congress specifically required that upwind States eliminate their downwind impacts not only when attainment of air quality standards is in doubt, but when good air quality might be degraded or visibility compromised, "notwithstanding attainment" of the standards. While EPA did not rely on part C compliance for the Rule, Respondents' premise that the Act prohibits EPA from requiring emission reductions that

would yield air quality better than air quality standards is wrong. *See* Calpine/Exelon Br. 54 n.35.

Even assuming that Respondents' premise were correct, it does not follow that EPA exceeded its authority in adopting the Transport Rule. Without citation to the administrative record, Respondents hypothesize that EPA could have relaxed the budgets of some States by assuming a lower pollution control cost, and nonetheless eliminated the contribution of those States to downwind impacts. This supposition ignores the practical realities of applying economic incentives to the electric generation sector in a way that *actually reduces interstate pollution*, which is the mandate of the Good Neighbor Provision. EPA entertained and rejected this supposition for reasons well within its rulemaking discretion.

In an incentive-driven system, participants will reduce their emissions only when the cost of doing so is less than the value of the incentive offered. If an allowance can be purchased for less than the cost of eliminating one ton of pollution, a rational market participant will purchase the allowance rather than eliminate the pollution. While this purchase represents "compliance," it does not reduce pollution or improve air quality in any downwind State, and thus does not fulfill the mandate of the Good Neighbor Provision. Therefore, in developing an effective market system, EPA had to ensure that the price of allowances would be high enough to incentivize the operation of existing emission controls and the installation of sufficient new controls in upwind States in order to reduce downwind pollution. *See* Stephen G. Breyer, *Regulation and Its Reform* 273 (Harvard University Press 1982) (noting that pollution tax will not yield adequate emission reductions if set too low).

Given the means available to reduce NO_x and SO_2 emissions, there is a minimum cost that power plants must incur to eliminate each incremental ton of pollution. This minimum cost reflects the price of emission control chemicals, lost electric generation, substitute fuels and other costs depending on the pollutant and the particular means chosen by the power plant owner to reduce emissions. Exercising its core rulemaking authority, EPA determined this minimum cost to be approximately $500 per ton for NO_x, and for SO_2 in most States. This conclusion is amply supported by the administrative record. *See, e.g.*, App. 350a-351a, 354a-356a; *Proposed Transport Rule*, 75 Fed. Reg. 45,210, 45,276 (Aug. 2, 2010). Certainly, the precise cost varies among the more than 1,000 generation units covered by the Rule. Some may have a minimum cost slightly below $500/ton. However, such data-driven judgments are consigned to the expert agency, and there is no indication in the record that EPA's estimate was unreasonable. Having determined this minimum cost, EPA was equally justified in concluding that hypothetical allowance costs below $500 per ton would produce *insufficient actual emission reductions.*[6] *See* App. 350a-351a, 354a-356. No rational market participant would spend $500 to eliminate a ton of pollution if it could comply with the law by purchasing a $200 or $300 or $400 allowance instead.

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6. Respondents suggest that it was inappropriate for EPA to reject sub-$500 allowance prices because lower prices would cause generators to cease to operate pollution controls. ILR Br. 16. Of course, the consequence of *not operating controls* is increased pollution, which is fundamentally inconsistent with a program required to decrease pollution.

Using economic models specific to the electric generation industry, EPA then evaluated potential State emission budgets by assessing the amount of pollution that power plants in each upwind State would emit if required to expend an additional $500 per ton of pollution. *See* Calpine/Exelon Br. 11, 23. EPA modeled these projected emissions and their impact on downwind air quality, and concluded that, in most cases, downwind nonattainment and maintenance problems would be eliminated at this minimum cost level.[7] EPA established State-specific emission budgets (*i.e.*, the number of allowances) based on these projected emissions.[8] *See* EPA Br. 10-12.

Respondents' argument that EPA was legally required to adopt lower budgets in order to avoid "overcontrol" ignores the practical reality that the budgets adopted by EPA were based on the *minimum* cost to eliminate a ton of pollution. EPA need not engage in extensive investigations to predict what would happen if allowance prices were lower than the real cost of pollution reductions: pollution would not be reduced. The Good Neighbor Provision requires real emission reductions, not fruitless hypothetical exercises incapable of application in the real world. *See North Carolina*, 531 F.3d at 907-908 (Good

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7. The noteworthy exception relates to States whose contributions of SO_2 could only be eliminated at much higher cost levels (the Group 1 SO_2 States), and some downwind impacts would remain at even these higher cost levels. *See* Calpine/Exelon Br. 52 n.34.

8. By employing state-of-the-art modeling tools that predict both the response of power plant operators and the dispersion patterns of air pollution, EPA was able to resolve two potential problems with systems of "marketable rights" – uncertainty as to the cost of allowances and predictability of the location of reductions. *See* Breyer, *Regulation and Its Reform* 273-76.

Neighbor regulations must result in reductions that actually "achieve something measurable").

B. EPA Reasonably Chose To Use A Uniform Control Cost To Minimize Trading Markets And To Maximize Efficiency.

The effectiveness of a market-based system begins with the requirement that economic incentives exceed minimum control costs, but does not end there. EPA properly considered a variety of other appropriate factors in developing the Rule. Among these considerations were impacts on the electric generation system, ease of implementation and cost-effectiveness. When they claim that EPA should have established less restrictive budgets, Respondents argue, in effect, that rather than establishing a single market for NO_x allowances based on a $500/ton control cost and including power plants in 27 States (and two markets for SO_2 allowances), EPA should have established multiple markets based on marginally different control costs, each consisting of fewer, or even single, States.[9] Even if EPA could have made subtle distinctions between the control costs (*i.e.*, hypothetical allowance prices) used to develop different State budgets, EPA reasonably chose to minimize the number of cost distinctions in pursuit of its primary objective of enforcing the substantive reductions mandated by the Good Neighbor Provision.

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9. Respondents who assert that EPA could not consider cost at all would logically be required to maintain that EPA could not establish any program deploying a system of economic incentives based on cost to implement the Good Neighbor Provision.

The electric generation market is not cabined by State boundaries. When a need for more power arises, it will be met by the plant that can generate that power cheapest, whether that plant is next door or three States away. *See* Calpine/Exelon Br. 7-10, 19; App. 348a. This fluidity has two implications for the Rule, both of which support EPA's use of the fewest control cost distinctions in developing the Transport Rule system.

First, the Rule operates by creating incentives that change the geographic distribution of electric generation, and thus the distribution of the pollution from that activity. When an additional control cost is introduced into the generation system, generation shifts to power plants that have the lowest generation cost, taking into account that new control cost. *See* Calpine/Exelon Br. 1-10. The Transport Rule uses this market structure to shift generation to plants that produce less pollution. Had EPA used different control costs for each State, the Rule would instead shift generation to plants in the lower cost States, regardless of whether those plants would in fact produce less pollution, or would create new downwind air quality problems. *See* App. 384a (describing "emissions leakage").

Second, if EPA based different State budgets on different control costs, the only way for EPA to ensure that the emission reductions needed to satisfy the Good Neighbor Provision would actually occur would be to prohibit trading between States. *See* Calpine/Exelon Br. 55-57. Respondents' claim that EPA never considered a more vigorously tiered approach to cost is untrue. EPA thoughtfully considered the implications of such distinctions in several ways. Most obviously, when EPA determined that the Group 1 SO_2 States required costlier

reductions, EPA concluded that it could not permit trading of allowances between Group 1 States (with a control cost of $2,300/ton) and Group 2 States (with a control cost of $500/ton). Calpine/Exelon Br. 37; App. 386a-387a, 425a. Rather than having one trading market for NO_x allowances and two for SO_2 allowances, EPA would have had to create a separate trading market for each control cost it used for each type of allowance, and to prohibit trading between markets.

The Balkanization of the allowance markets into areas of like cost assumptions would not be merely inconvenient or administratively cumbersome. Calpine/Exelon Br. 38-41. Such cost distinctions, and the fallout from them, would undermine the effectiveness of the Rule. *Id.* The logical extension of Respondents' argument is that each State would have its own allowance markets based on its own unique minimum control costs (or such higher costs as EPA determined was necessary to eliminate downwind impacts). EPA considered and rejected an alternative program that would have prohibited interstate trading. EPA found that such a system would be administratively unworkable, but perhaps more importantly, found that such a system would be more costly and less efficient than the system ultimately adopted. App. 428a-429a.

The larger the market across which a scheme of economic incentives may be applied, the more effective and efficient those incentives will be. *See* Hobbs Br. 26-31. EPA reasonably concluded that the effectiveness and efficiency of the Transport Rule would be compromised if too many sub-markets were created, App. 428a-429a, and how many is "too many" is precisely the sort of task that Congress consigned to EPA's expert decision-making.

Respondents focus so narrowly on cost that they do not credit the need for EPA to address critical rulemaking considerations such as efficiency, reliability, regulatory certainty and above all, efficacy in assuring the emission reductions required by the Act. Respondents' criticisms of EPA's regulatory choices are inconsistent with the text and purpose of the Act, and the role that Congress assigned to EPA. There is nothing in the language of the Good Neighbor Provision or elsewhere in the Act that, construed in context, would prohibit EPA from overlooking marginal (if not entirely hypothetical) cost distinctions among States in order to establish an effective and efficient system of economic incentives that will produce the actual emission reductions necessary to fulfill the obligations of defaulting States under the Good Neighbor Provision.

CONCLUSION

Respondents Calpine Corporation and Exelon Corporation respectfully request that the Court reverse the decision of the court of appeals and reinstate the Transport Rule.

Respectfully submitted,

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RESPONDENT'S BRIEF

Nos. 12-1182, 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RULE 29.6 STATEMENT

ARIPPA is a non-profit trade association that represents a membership primarily comprised of electric generating plants using environmentally friendly circulating fluidized bed ("CFB") boiler technology to convert coal refuse and/or other alternative fuels such as biomass into alternative energy and/or steam, with the resultant alkaline ash used to reclaim mine lands. ARIPPA was organized in 1988 for the purpose of promoting the professional, legislative and technical interests of its member facilities. ARIPPA has no outstanding shares or debt securities in the hands of the public and does not have any parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Big Brown Lignite Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Big Brown Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Dairyland Power Cooperative is a non-stock, not-for-profit cooperative association organized under the laws of the State of Wisconsin, with its principal office located in La Crosse, Wisconsin. Dairyland is engaged, among other things, in the business of generating and transmitting electric power to its 25 member distribution cooperatives and to other wholesale customers. Dairyland has no corporate parent. No publicly held corporation owns a 10% or greater ownership interest in Dairyland.

EME Homer City Generation, L.P. ("EME Homer City") is a limited partnership composed of Mission Energy Westside, Inc., a California corporation, as the general partner and Chestnut Ridge Energy Company, a California corporation, as the limited partner. Mission Energy Westside, Inc. and Chestnut Ridge Energy Company are wholly owned subsidiaries of Edison Mission Holdings Company, which, in turn, is a wholly owned subsidiary of Edison Mission Energy. Edison Mission Energy is a Delaware Corporation, which is a wholly owned subsidiary of Mission Energy Holdings Company, a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison Mission Group, Inc., a Delaware corporation, which, in turn, is a wholly owned subsidiary of Edison International, a California corporation.

On May 2, 2013, EME Homer City filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Illinois. EME Homer City has requested that the bankruptcy court jointly administer its case (13-18703) with the lead case, *In re Edison Mission Energy*, Case No. 12-49219 (JPC).

When EME Homer City filed its petition in the Court of Appeals, EME Homer City was the lessee and operator of the Homer City generating station, a coal-burning electric power facility that is affected by the Transport Rule. Edison Mission Energy is an independent power producer that generates electricity to sell wholesale in the open market. The ultimate parent company, Edison International, is engaged in the business of holding for investment the common stock of its subsidiaries which also include Southern California Edison, a California public utility corporation, and Edison Capital, which has investments in

energy and infrastructure projects worldwide. In addition, the following parent companies, or affiliates of EME Homer City have outstanding shares that are in the hands of the public: Edison International and Southern California Edison.

Entergy Corporation is a publicly traded company and no publicly held company has a 10 percent or greater ownership interest in Entergy Corporation.

Environmental Energy Alliance of New York, LLC has no parent corporations and no publicly held company owns 10% or more of its stock.

The Kansas City Board Of Public Utilities-Unified Government Wyandotte County/Kansas City, Kansas is not required to provide a Corporate Disclosure Statement because it is a governmental entity organized under the laws of the state of Kansas. Accordingly, no Corporate Disclosure Statement is being provided.

The Lafayette Utilities System, a department within the Lafayette City-Parish Consolidated Government, is a local government utility primarily servicing the citizens of the City of Lafayette, Louisiana. As a customer-owned municipal utility, the Lafayette Utilities System's mission is to provide its customers with quality and affordable electric, water, wastewater and fiber optic services. The Lafayette Utilities System does not issue stock; it does not have a parent corporation, and no publicly held corporation holds any Lafayette Utilities System stock.

The Louisiana Chemical Association has no parent companies, and no publicly held company has a 10% or greater ownership interest. The Louisiana Chemical Association is a non-profit Louisiana corporation formed in 1959. Its mission is to promote a positive climate for chemical manufacturing that ensures

long-term economic growth for its members. It is a "trade association."

Luminant Big Brown Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Energy Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Generation Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears below.

Luminant Holding Company LLC is the parent company that wholly owns Luminant Generation Company LLC, Sandow Power Company LLC, Big Brown Power Company LLC, Oak Grove Management Company LLC, Luminant Mining Company LLC, Big Brown Lignite Company LLC, Luminant Big Brown Mining Company LLC, and Luminant Energy Company LLC (collectively, the "Luminant Entities"). Luminant Holding Company LLC is a wholly owned subsidiary of Texas Competitive Electric Holdings Company LLC ("TCEH"). TCEH is a wholly owned subsidiary of Energy Future Competitive Holdings Company ("EFCH"). EFCH is a wholly owned subsidiary of Energy Future Holdings Corp. ("EFH Corp."), formerly TXU Corp. Substantially all of the common stock of EFH Corp is owned by Texas Energy Future Holdings Limited Partnership, which is a privately held limited partnership. No publicly held entities have a 10% or greater ownership interest in EFH Corp.

Luminant Mining Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

Northern States Power Company – Minnesota is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Northern States Power Company – Minnesota.

Oak Grove Management Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC, whose complete corporate disclosure statement appears above.

San Miguel Electric Cooperative, Inc. is a 400 MW, mine-mouth, lignite-fired electric generating unit located in Atascosa County, Texas roughly 45 miles south of San Antonio. San Miguel was created on February 17, 1977, under the Rural Electric Cooperative Act of the State of Texas, for the purpose of owning and operating the generating plant and associated mining facilities that furnish power and energy to Brazos Electric Power Cooperative, Inc. and South Texas Electric Cooperative, Inc. San Miguel is a not-for-profit electric cooperative incorporated in the State of Texas under the Electric Cooperative Corporation Act, Tex. Util. Code, Chapter 161. San Miguel does not have any outstanding shares or debt securities in the hands of the public nor any parent, subsidiary, or affiliates that have issued shares or debt securities to the public and no publicly owned company has an ownership interest in San Miguel.

Sandow Power Company LLC is a wholly owned subsidiary of Luminant Holding Company LLC,

whose complete corporate disclosure statement appears above.

Southwestern Public Service Company is a wholly owned subsidiary of Xcel Energy Inc. Xcel Energy Inc. is a registered, public utility holding company that is incorporated under the laws of the State of Minnesota. No other publicly held company holds a 10 percent or greater ownership interest in Southwestern Public Service Company.

Sunflower Electric Power Corporation is a Kansas non-profit corporation doing business as a cooperative with its principal place of business in Hays, Kansas. It is not a publicly held corporation; no publicly held corporation holds any ownership interest in it and it has no "parent" corporation. It is owned solely by its seven member distribution cooperatives, all of which are located in western Kansas. Sunflower Electric Power Corporation is engaged in the generation, transmission and sale of electric power and energy at wholesale to its member distribution cooperatives and municipalities in the state of Kansas.

United Mine Workers of American ("UMWA") is a non-profit national labor organization with headquarters in Triangle, Virginia. UMWA's members are active and retired miners engaged in the extraction of coal and other minerals in the United States and Canada, and workers in other industries in the United States organized by the UMWA. UMWA is affiliated with the American Federation of Labor-Congress of Industrial Organizations. UMWA has no parent companies, subsidiaries, or affiliates that have issued shares or debt securities to the public.

Westar Energy, Inc., a publicly traded Kansas corporation with its principal place of business in Topeka, Kansas, is the parent corporation of Kansas Gas

and Electric Company ("KGE"), a Kansas corporation with its principal place of business in Topeka, Kansas. Westar and its wholly owned subsidiary, KGE, are electric utilities engaged in the generation, transmission, distribution and sale of electric power and energy at wholesale and retail to approximately 687,000 customers in the state of Kansas. Westar owns all of the stock of KGE. In addition to Westar's publicly traded stock, both Westar and KGE have issued debt and bonds to the public. There is no corporation that owns 10% or more of the stock of Westar Energy, Inc.

Western Farmers Electric Cooperative ("WFEC") hereby certifies that no publicly held company has a 10 percent or greater ownership interest in WFEC. WFEC is a non-profit generation and transmission rural electric cooperative that supplies wholesale electricity to its member owners, which include 19 rural electric distribution cooperatives located in Oklahoma and 4 distribution cooperatives located in New Mexico.

Wisconsin Public Service Corporation ("WPSC") is a wholly owned subsidiary of the publicly owned corporation Integrys Energy Group, Inc (NYSE: TEG). WPSC is a regulated electric and natural gas utility operating in northeast and central Wisconsin and an adjacent portion of Upper Michigan.

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INTRODUCTION

The Clean Air Act's "good-neighbor" provision requires upwind States to prohibit air pollutant emissions in "amounts which will ... contribute significantly" to downwind States' nonattainment of federal air-quality standards. 42 U.S.C. §7410(a)(2)(D)(i)(I). In the Transport Rule, EPA relied on this provision to impose what it deemed "reasonable" and "cost-effective" emission reductions on upwind States, without regard to each individual upwind State's actual contribution to downwind nonattainment, and without regard to whether the overall reductions mandated were greater than necessary to achieve downwind attainment. The court of appeals correctly held that this approach exceeds EPA's statutory authority under the good-neighbor provision.

While faulting the court of appeals for purportedly failing to ground its holdings in any "language in the Act," EPA Br. 45, EPA makes no serious attempt to square its interpretation with the good-neighbor provision's text. Nor could it. The good-neighbor provision did not grant EPA general authority to impose "reasonable" or "cost-effective" emission reductions. Indeed, as read by EPA, the good-neighbor provision would impose no meaningful limits on the agency. As EPA acknowledged below, its reading of the statute would allow the agency to "require a State to reduce *more than the State's total emissions that go out of State*." Pet.App.38a n.23.

Congress, however, did not give EPA a blank check in the good-neighbor provision. The statute grants EPA only limited authority to require upwind States to "prohibit" emissions based on their effect on downwind attainment. EPA's approach is fundamentally inconsistent with the statutory criteria estab-

lished by Congress and, as implemented in the Transport Rule, transgressed EPA's legal authority in three independent ways, each of which provides a ground for vacating the Transport Rule. The decision below is correct and should be affirmed.

STATEMENT OF THE CASE

1. The Clean Air Act (CAA or Act) requires EPA to establish national ambient air quality standards (NAAQS) for air pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. §7408(a)(1)(A); see also *id.* §7409. It also requires EPA to designate areas of the country as "attainment," "nonattainment," or "unclassifiable" for each such pollutant, depending on whether the area meets NAAQS. *Id.* §7407(c), (d). Although EPA sets NAAQS, each State has "primary responsibility for assuring air quality" within its borders, *id.* §7407(a), and must develop a state implementation plan (SIP) to meet NAAQS and submit its SIP to EPA for approval, *id.* §7410.

Section 110(a)(2) addresses the specific elements that must be included in a SIP. These elements include a "good-neighbor" provision to address interstate pollution. Section 110(a)(2)(D) requires that SIPs "contain adequate provisions" prohibiting, "consistent with the provisions of this subchapter, any source ... within the State from emitting any air pollutant in amounts which will ... contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS]." *Id.* §7410(a)(2)(D)(i)(I). As pertinent here, various sources, including power plants, emit sulfur dioxide (SO_2) and nitrogen oxides (NO_x), which can contribute to downwind States' nonattainment of the

particulate matter ($PM_{2.5}$) and ozone NAAQS. 76 FR 48208, 48218 (Aug. 8, 2011) (Pet.App.165a–169a).[1]

2. In 1998, EPA issued the "NO_x SIP Call." This rule instructed more than 20 upwind States to revise their SIPs to mitigate downwind ozone by imposing NO_x emission limits on sources in these States. 63 FR 57356 (Oct. 27, 1998). EPA determined whether an upwind State was "contribut[ing] significantly to nonattainment" by using a "multifactor" test that considered both air quality and the cost of emission reductions. *Id.* 57376. EPA then set regulated upwind States' emission-reduction obligations (known as "emission budgets") based on the amount of emissions that could be eliminated through "reasonable, highly cost-effective NO_x control measures." *Id.* 57423. EPA ensured that these emission budgets did not produce "'overkill'"—*i.e.*, "that none of the upwind reductions required ... [wa]s more than necessary to ameliorate downwind nonattainment." *Id.* 57403; see also *id.* 57379; EPA *Michigan* Cert. Opp. 11.

The D.C. Circuit largely upheld the NO_x SIP Call in *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000). Relevant here, the court held that EPA could consider "cost-effectiveness in determining what contributions are 'significant.'" *Id.* 675. The court held that the term "significant" was ambiguous and that the D.C. Circuit's precedents authorized agencies to ensure that regulations provide "benefits at least 'roughly commensurate with their costs.'" *Id.* 679.

Judge Sentelle dissented from the majority's holding that EPA could define "contribute significantly" based on "cost-effectiveness." Under the statute's

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[1] The relevant NAAQS attainment thresholds are 15 $\mu g/m^3$ for annual $PM_{2.5}$, 35 $\mu g/m^3$ for 24-hour $PM_{2.5}$, and 85 ppb for 8-hour ozone. 76 FR at 48218 (Pet.App.168a).

plain language, Judge Sentelle observed, "Congress clearly empowered EPA to base its actions on amounts of pollutants, those amounts to be measured in terms of significance of contribution to downwind nonattainment." *Id.* 695. Judge Sentelle faulted the majority for reading "significantly" in isolation. *Id.* 696–97. "While the contribution must affect nonattainment significantly, no reasonable reading of the statutory provision in its entirety allows the term significantly to springboard costs of alleviation into EPA's statutorily-defined authority." *Id.* 696.

3. In 2005, EPA issued the Clean Air Interstate Rule (CAIR), which addressed downwind attainment of the annual $PM_{2.5}$ NAAQS in addition to the ozone NAAQS. 70 FR 25162 (May 12, 2005). In CAIR, EPA purported to "adop[t] much the same interpretation and application of section 110(a)(2)(D) ... as EPA adopted in the NO_x SIP Call." *Id.* 25174. But it used a different approach for determining whether an upwind State was "contribut[ing] significantly" to downwind nonattainment. Using computer modeling, EPA projected whether, assuming the controls to be required by CAIR were not in effect, upwind States would contribute more than a specified threshold amount of pollution to downwind locations experiencing $PM_{2.5}$ or ozone attainment problems. *Id.* 25174, 25189–92. Only States that contributed more than this threshold were found to be "contribut[ing] significantly" and subject to emission budgets. *Id.*; see also *id.* 25188 ("[A]mbient impacts below the threshold mean that the upwind State's emissions do not contribute significantly to nonattainment."); *id.* 25191 (contribution below "this threshold ... indicates a lack of significant contribution").

After determining which upwind States were "contribut[ing] significantly to nonattainment," EPA

set emission budgets using the same approach as in the NO_x SIP Call—*i.e.*, by reference to regionwide "highly cost effective" emission controls. *Id.* 25173, 25176–77, 25199–215. EPA refused to adjust its emission budgets "simply because they may have the effect of reducing the upwind State's contribution to below the initial threshold" used to determine whether the upwind State was "contribut[ing] significantly to nonattainment" in the first instance. *Id.* 25177. On the other hand, as in the NO_x SIP Call, EPA did consider whether its "cost-effective" controls were "more than is necessary for downwind areas to attain" NAAQS. *Id.* 25175; see *id.* 25177 ("[T]he regionwide reductions do not reduce $PM_{2.5}$ levels beyond what is needed for attainment and maintenance.").

In *North Carolina* v. *EPA*, the D.C. Circuit invalidated CAIR because EPA had not tailored its budgets to individual upwind States' emissions that actually "contribute significantly" to downwind nonattainment. 531 F.3d 896 (D.C. Cir.), *on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008). *North Carolina* rejected EPA's approach of allocating emission-reduction burdens among States in a way the agency considered "fai[r]." *Id.* 918–19. It held that EPA has "no authority to force an upwind state to share the burden of reducing other upwind states' emissions"; rather, "[e]ach state must eliminate its own significant contribution to downwind pollution," and EPA "may not require some states to exceed the mark." *Id.* 921. The D.C. Circuit remanded, but allowed CAIR to remain in place while EPA developed a new rule. 550 F.3d at 1178.

4. In response to *North Carolina*, EPA issued the Transport Rule at issue here, which addresses NO_x and SO_2 emissions that affect downwind States' ability to meet NAAQS for annual $PM_{2.5}$, 24-hour $PM_{2.5}$, and ozone. 76 FR at 48209 (Pet.App.128a–129a). De-

spite *North Carolina*, EPA in the Transport Rule retained the same basic approach it used in CAIR to define "contribute significantly."

EPA initially determined which downwind locations would have problems attaining or maintaining NAAQS in 2012 if CAIR were not in effect. *Id.* 48211 (Pet.App.137a). Because of the hypothetical nature of this inquiry, EPA used computer modeling to predict future downwind air quality on the assumption that States were not implementing CAIR. *Id.* 48229–30 (Pet.App.217a–225a).[2] EPA then used a two-stage approach to determine (1) whether to regulate an upwind State's emissions and (2) the emission budget for each regulated State.

At the first stage, EPA used its air-quality models to predict the amount each upwind State would contribute to the downwind locations it had identified (again assuming, counterfactually, that CAIR was not in effect). *Id.* 48233–36 (Pet.App.236a–254a). To determine which upwind States to regulate, EPA set air-quality contribution thresholds at 1% of each NAAQS. *Id.* 48236 (Pet.App.255a). Upwind States whose contributions to a nonattainment or maintenance location were predicted to exceed this threshold were deemed "linked" to that location and subjected to emission budgets. *Id.* Conversely, EPA found that "states whose contributions are below these

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[2] Specifically, EPA projected "design values"—EPA's statistic for measuring air quality relative to NAAQS—for receptor locations assuming no CAIR or Transport Rule requirements were in place, and called this projection the "base case." EPA also made "remedy case" projections reflecting projected air quality after imposition of Transport Rule emission budgets. See CAJA2945–48 (describing air-quality assessment tools); CAJA2549–637 (providing "base case" and "remedy case" air-quality projections for locations in Eastern U.S.).

thresholds *do not significantly contribute* to nonattainment," and thus were not subject to emission budgets. *Id.* (emphasis added); see also *id.* 48237 (Pet.App.256a) (the 1% threshold "identif[ies] states whose contributions *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS") (emphasis added).

After determining which upwind States to regulate, EPA proceeded in the second stage to determine their emission-reduction obligations based on EPA's view of "reasonable" and "cost-effective" controls. *Id.* 48248–49, 48257 (Pet.App.316a–323a, 355a–358a). Specifically, EPA generated "cost curves" by evaluating the combined emission reductions that would result if upwind States adopted the emission controls available at varying costs per ton, used those curves to identify the "cost threshold" at which downwind air-quality improvements could be achieved at the cost per ton EPA deemed "cost-effective," and then set individual State emission budgets based on the reductions achievable in each State at that uniform cost threshold. *Id.*; see Calpine Br. 23–25 ("the cost of reducing emissions was a key factor EPA used to define 'amounts' that 'contribute significantly'").[3]

Thus, in contrast to its method for deciding which States to regulate, where it determined whether a State "contribute[s] significantly" by examining its actual contribution to downwind air quality, in set-

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[3] For 2012 budgets, EPA chose a $500/ton threshold for both SO_2 and NO_x—*i.e.*, EPA calculated the amount of SO_2 and NO_x emissions each State could reduce at $500 per ton of emissions removed. 76 FR at 48249–52, 48257–59 (Pet.App.324a–332a, 355a–365a). For 2014 budgets, EPA split the States into two groups for SO_2, and chose $2,300/ton for Group 1 and $500/ton for Group 2. *Id.* The 2014 NO_x budgets used the $500/ton threshold. *Id.*

ting emission budgets EPA "define[d] each state's significant contribution ... as the emission reductions available at [the applicable] cost threshold." 76 FR at 48248 (Pet.App.318a); see also *id.* 48303 (Pet.App. 577a) ("a state's significant contribution to nonattainment or interference with maintenance is defined by EPA as all emissions that can be eliminated for a specific cost").

Consequently, a State's emission budget bore no relationship to its relative contribution to downwind nonattainment. For example, although Florida was "linked" to just two receptors (in Harris, Texas) for ozone, 76 FR at 48246 (tbl.V.D-9) (Pet.App.306a), and although Louisiana's contribution to those receptors was greater than Florida's, CAJA2704, EPA's cost-based methodology imposed much larger emission-reduction obligations on Florida than Louisiana, 76 FR 48262–63 (tbl.VI.D-4), 48307 (tbl.VIII.A-5) (Pet.App.382a, 592a) (requiring Florida to reduce NO_x emissions from 45,993 tons to 27,825 tons, while requiring Louisiana to reduce from 13,924 tons to 13,432 tons).

Further, in stark contrast to its approach in CAIR and the NO_x SIP Call, EPA never considered whether the emission reductions it directed were greater than necessary to achieve attainment. Compare 76 FR at 48250, 48256–57 (Pet.App.325a, 354a), with 63 FR at 57379, 57403; 70 FR at 25175, 25177. With regard to NO_x, EPA refused to consider evidence indicating that less costly controls would still allow downwind States to attain NAAQS. CAJA1062–69. EPA's sole explanation was that some power plants might cease operating some existing NO_x controls at a cost threshold below $500/ton. 76 FR at 48256–57 (Pet.App.354a). EPA offered no justification at all for its refusal to consider SO_2 controls costing less than

$500/ton, even though data demonstrated "similar air quality benefits could be achieved at between $200 and $400 per ton." CAJA1374.

Because EPA set emission budgets based on "reasonable" and "cost-effective" controls, it did not measure the air-quality contributions each individual upwind State's emissions would be making after imposition of emission controls. Thus, as in CAIR, EPA did not assess whether the emission controls it mandated would drive a State's contribution below the insignificance threshold, even though EPA previously had determined in stage one that emissions below that threshold "d[id] not significantly contribute to nonattainment or interfere with maintenance." 76 FR at 48236 (Pet.App.255a).

5. On review, the court of appeals concluded that "EPA's reading of Section 110(a)(2)(D)(i)(I)—a narrow and limited provision—reaches far beyond what the text will bear." Pet.App.40a. The court rejected EPA's position that the good-neighbor provision grants EPA a "blank check" to impose "reasonable" and "cost-effectiv[e]" emission reductions, *id.* 2a, 23a & n.12, 38a & n.23, finding it "inconceivable that Congress buried in" the good-neighbor provision "an open-ended authorization for EPA to effectively force every power plant in the upwind States to install every emissions control technology EPA deems 'cost-effective,'" *id.* 41a. Specifically, the court held that EPA's approach disregarded "the limits imposed by the statutory text" in "at least three independent" respects. *Id.* 4a, 31a.

First, the court held that the statute's text does not permit EPA to "force a State to eliminate more than its own '*significant*' contribution to a downwind State's nonattainment area." Pet.App.23a. The court held that EPA's methodology violated this constraint

because EPA first defined "amounts" of air-quality contribution that were "insignificant," thereby "establish[ing] a floor below which 'amounts' of air pollution do not 'contribute significantly,'" but then "ignore[d]" that statutory boundary and set emission budgets "in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a–37a.

Second, the court held that the good-neighbor provision does not permit EPA to set emission budgets "without regard to an individual upwind State's actual contribution to downwind air quality," which necessarily depends on "each State's relative contribution to the downwind State's nonattainment." Pet.App.23a–24a. The court found that EPA violated this requirement because it relied on "cost-effectiveness" to require upwind States "to eliminate *more* than [their] statutory fair share," without taking into account their actual contributions to the downwind State's air quality or the downwind State's own contribution. *Id.* 38a–39a.

Third, the court held that because the good-neighbor provision targets only "those emissions from upwind States that 'contribute significantly *to nonattainment*,'" EPA must "ensure that the combined obligations of the various upwind States, as aggregated, do not produce more than necessary 'over-control' in the downwind States—that is, that the obligations do not go beyond what is necessary for the downwind States to achieve the NAAQS." Pet.App.27a–28a. The court found that "EPA did not try to take steps to avoid such over control." *Id.* 40a.

The court recognized, however, that "multiple upwind States may affect a single downwind State" and "a single upwind State may affect multiple downwind States." Pet.App.29a. The court held that EPA had

"discretion" to account for these complexities and was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not ... possible" to do so. *Id.* The court required EPA to eliminate "over-control" only where technically feasible and not where it is "unavoidable." *Id.* 28a–29a.

Because the court concluded that the "Transport Rule stands on an unsound foundation," including EPA's "flawed construction" of the good-neighbor provision, and because that deficiency was "too fundamental" to cure through targeted corrections, the court vacated the Transport Rule. Pet.App.62a–63a.[4] However, the court allowed EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* 64a. Under CAIR, the vast majority of downwind locations in the eastern United States (the area of concern in the Transport Rule) have attained the NAAQS at issue in the rule. EPA, *Progress Report 2011: Environmental and Health Results* 12, 14 (2013) (*2011 Progress Report*). The emission-reduction obligations imposed in the Transport Rule, however, are substantially greater than those imposed under CAIR. 76 FR 70091, 70099 (Nov. 10, 2011); 75 FR 45210, 45217 (Aug. 2, 2010); 76 FR at 48214–15 (Pet.App.149a–155a).

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[4] The court did not rule on several arguments raised below that would independently require vacatur of the Transport Rule. See Industry/Labor CA Br. 37–47; States CA Br. 42–55. Thus, even if this Court were to reverse, a remand would be required to resolve these remaining objections.

SUMMARY OF ARGUMENT[5]

I. The court of appeals correctly held that in promulgating the Transport Rule EPA exceeded its statutory authority under the good-neighbor provision in three independent respects.

A. EPA failed to ensure that the emission reductions it ordered were not greater than necessary for downwind States to attain and maintain NAAQS. The good-neighbor provision requires upwind States to prohibit emissions that "contribute significantly *to nonattainment*." Despite record data showing it had massively overcontrolled upwind States and that less stringent emission-reduction obligations would have achieved downwind attainment, EPA refused to consider less stringent emission-reduction obligations, offering as its sole reason that they might cause some sources to discontinue operating existing controls. Neither that naked policy reason nor any of the *post hoc* rationales petitioners advance in their briefs justifies EPA's failure to limit emission reductions to those necessary to achieve downwind attainment.

B. EPA further exceeded its authority by defining "contribute significantly" based on the cost of emission controls rather than States' relative contributions to downwind nonattainment. By its terms, the good-neighbor provision focuses on the *effect* a State's emissions have on downwind air quality, not the *cost* of eliminating them. Given that Congress expressly authorized consideration of costs in many other provisions of the CAA, Congress' silence as to costs here

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[5] This brief addresses the court of appeals' holding that the Transport Rule violated the good-neighbor provision's substantive limits. The court also held that the Transport Rule violated the CAA's "cooperative federalism" structure; that issue is addressed in the state and local governments' brief.

precludes EPA from considering costs to define "contribute significantly."

Petitioners' contrary argument improperly reads the term "significantly" in isolation, ignores both the remainder of the provision and its statutory history, and produces the untenable result that States contributing identical "amounts" of air pollution to the same downwind location may be deemed to have different "significant contributions." Contrary to its contentions here, EPA never claimed in the Transport Rule, and certainly has not shown, that it would be impossible to comply with the statute's directive to define "contribute significantly" based on each State's actual contribution to downwind nonattainment.

C. EPA also erred by setting emission budgets without regard to its finding that States contributing less than 1% of the NAAQS do not "contribute significantly" to nonattainment. In so doing, EPA adopted fundamentally inconsistent definitions of the *same statutory term* and adopted a methodology that could require a State to eliminate more than its own "significant contribution." Petitioners' *post hoc* assertion that it is "unlikely" any State was driven below the insignificance threshold is both legally irrelevant and unsupported by the record, which shows that EPA imposed substantial emission-reduction obligations on States that were contributing only slightly above the 1% insignificance threshold.

II. Although petitioners assert that the court of appeals "lacked jurisdiction" to consider the challenges on which it granted relief, they make no effort to show that the issue-exhaustion requirement in CAA §307(d)(7)(B) is jurisdictional. It is not. The provision limits the objections the parties may raise, not the issues the reviewing court may decide. Another subsection of §307(d) expressly requires compliance with

the issue-exhaustion requirement as a condition of the court's power to grant relief on *procedural* grounds, making clear that Congress preserved the court's common-law discretion to grant relief on unexhausted *substantive* grounds. The answer to the first question presented is therefore "no," and the Court need not address petitioners' factbound exhaustion contentions, which are outside the scope of the questions presented.

In any event, petitioners' exhaustion arguments, which either were not made at all below or were made only in the most tentative and glancing fashion, lack merit. Each of the issues on which the court of appeals granted relief was raised with "reasonable specificity" in comments presented to EPA during the Transport Rule proceeding. Petitioners either ignore these comments entirely or erroneously assert that they made only "policy" arguments, apparently because they failed to recite the magic words petitioners think are necessary to preserve a "statutory" objection. Regardless, EPA cannot credibly claim it lacked an opportunity to address these issues, which it has repeatedly considered in three separate rulemakings over more than a decade.

Finally, this Court can and should decide the merits of the issues, regardless of whether they were properly exhausted, because they were passed upon by the court of appeals. As EPA itself explained in urging the Court to grant certiorari, the issues have ongoing significance because EPA intends to use the Transport Rule as a model for future rulemakings. The issues have been fully briefed, are squarely presented, and will persist. In the interest of efficiency, and to provide needed guidance on the scope of EPA's authority under the good-neighbor provision, the Court should decide them now.

ARGUMENT

I. THE TRANSPORT RULE EXCEEDS EPA'S STATUTORY AUTHORITY UNDER THE GOOD-NEIGHBOR PROVISION.

A. EPA Failed To Ensure That The Emission Reductions It Mandated Were Not Greater Than Necessary For Downwind States To Achieve Attainment.

1. The court of appeals correctly held that the Transport Rule must be vacated because EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet.App.39a. This holding flows directly from the good-neighbor provision's text, which requires States to prohibit only those emissions that "contribute significantly *to nonattainment*." "The good neighbor provision is not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* 28a. Once a downwind location is able to attain and maintain NAAQS, EPA's authority to regulate upwind emissions ceases.

Thus, EPA was obligated to ensure that its emission controls did not "require upwind States to do more than necessary for the downwind States to achieve the NAAQS." Pet.App.39a–40a. This obligation applies regardless of the criteria EPA uses to define "contribute significantly," *i.e.*, even if EPA may consider costs. But see *infra*, I.B. If less costly emission controls would have achieved downwind attainment, EPA was required to "ratchet back the upwind States' obligations to the levels of reductions necessary and sufficient to produce attainment in the downwind States." Pet.App.28a. In past rulemakings,

EPA recognized this statutory obligation to avoid "'overkill.'" 63 FR at 57403; see *supra*, 3, 5.

In the Transport Rule, however, EPA refused to take steps to avoid such overcontrol. Commenters proffered data showing that less costly emission controls would have enabled downwind States to achieve attainment at almost all the same locations as the more costly controls EPA chose. See CAJA1062–69, 1351–52, 1371–74, 1384–86, 1662–65, 1694, 1959. But EPA refused to consider whether lower cost thresholds would have sufficed for upwind States linked to those locations. As to SO_2, EPA offered no reason for its refusal, and as to NO_x, it stated only that it "did not find cost thresholds lower than $500/ton for ozone-season NO_x to be reasonable" because they might cause some sources "to stop operating existing pollution control equipment." 76 FR at 48257 (Pet.App.354a).

Petitioners do not dispute the court of appeals' textual analysis. EPA Br. 49–53; ALA Br. 41–45. And EPA does not even attempt to defend its only stated reason for refusing to consider lower cost thresholds, which has no statutory basis—if upwind States can cease operating existing controls and still produce downwind attainment, EPA has no authority under the good-neighbor provision to require continued operation of existing controls. Instead, petitioners offer a series of arguments that were not made in the Transport Rule itself and are therefore barred, *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), and that in any event have no basis in the administrative record or the text of the good-neighbor provision.

2. EPA suggests it prevented overcontrol through its cost-benefit analysis, EPA Br. 52, which identified the "point [at which] air quality gains per dollar spent on additional reductions are ... smaller," 76 FR

at 48258 (Pet.App.359a). But such a cost-benefit analysis, even if properly conducted, is *irrelevant* to whether EPA overcontrolled. "Cost-effective" emission controls can still require upwind States to reduce more emissions than necessary for downwind States to achieve attainment. Likewise, it is irrelevant that the Transport Rule produced what EPA deems to be "beneficial and appropriate" downwind air quality. EPA Br. 53. The relevant statutory issue is whether *less stringent* emission budgets would *also* achieve downwind attainment. EPA cites no place in the Transport Rule where it conducted a relevant overcontrol analysis.[6]

EPA cannot provide such a citation because, as EPA ultimately concedes, EPA Br. 11, it expressly *refused* to undertake the necessary analysis based on policy concerns with no statutory foundation. ALA tries to justify EPA's failure to consider lower cost thresholds on the separate policy ground that the requirements EPA imposed were "modest." ALA Br. 43–44. But the good-neighbor provision does not allow EPA to prohibit "modest" amounts of upwind emissions without regard to whether those reductions are necessary to achieve downwind attainment. Regardless, ALA's "modesty" analysis was never provided by EPA in the Transport Rule and thus cannot sustain the rule. See *Chenery*, 332 U.S. at 196.

3. Alternatively, EPA suggests that its emission budgets did not cause any "significant amount of avoidable over-control." EPA Br. 53. EPA provides no

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[6] ALA's contention that EPA avoided overcontrol "in multiple ways," ALA Br. 41–42, fails for the same reason. Like EPA, ALA does not identify any part of the Transport Rule where EPA considered whether less stringent controls would allow some or all downwind States to achieve attainment.

citation for this claim, nor could it. Having refused to consider whether less stringent controls would achieve attainment, EPA never found that it had produced no avoidable overcontrol. This argument is thus barred by *Chenery*.

In fact, EPA did not merely fail to "sto[p] 'on a dime,'" *id.* 51—it drove through a flashing red light without even looking. The record shows that EPA massively overcontrolled. For example, for the locations projected to have problems attaining or maintaining the annual $PM_{2.5}$ NAAQS, EPA projected that the emission reductions it mandated would achieve air quality at *each* location *superior to* NAAQS, in many cases by a substantial margin. CAJA2964. The difference between NAAQS and the average air-quality levels EPA imposed for these locations was more than *15 times* the air-quality threshold (0.15 $\mu g/m^3$) that triggered emission budgets. See *id.* EPA likewise projected outcomes substantially superior to NAAQS for 24-hour $PM_{2.5}$[7] and ozone[8] for the substantial *majority* of locations.[9]

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[7] See CAJA2965 (listing 2014 "remedy case" design values for projected 24-hour $PM_{2.5}$ nonattainment and maintenance receptors). EPA projected that the 24-hour $PM_{2.5}$ receptors of concern would achieve, on average, a design value of 29.53 $\mu g/m^3$—well below the NAAQS of 35 $\mu g/m^3$. *Id.*

[8] Compare 76 FR at 48244–46 (Pet.App.301a–309a) (listing projected nonattainment and maintenance receptors for 8-hour ozone), with CAJA2549–79 (listing 2014 "remedy case" design values for 8-hour ozone for all downwind locations modeled by EPA relative to NAAQS attainment threshold of 85 ppb).

[9] Contrary to ALA's suggestion, ALA Cert. Reply 3–4, these same air-quality projections demonstrate that the Transport Rule also imposed emission reductions far greater than necessary to eliminate maintenance concerns at the substantial majority of locations at issue. EPA thus overcontrolled even under a "worst case" scenario that assumes these locations would ex-

Other EPA data also confirm that individual States were overcontrolled. For example, Texas was "linked" solely to Madison, Illinois for $PM_{2.5}$, 76 FR at 48241 (tbl.V.D-2), 48243 (tbl.V.D-5) (Pet.App.278a, 291a), but Madison was projected to achieve air quality significantly superior to NAAQS, CAJA2964–65. So too for South Carolina. Compare 76 FR at 48241 (tbl.V.D-2) (Pet.App.278a) (linking South Carolina solely to Fulton, Georgia for annual $PM_{2.5}$), with CAJA2964 (projecting post-Rule air quality for Fulton superior to NAAQS). Examples of overcontrol for ozone abound as well. Compare, *e.g.*, 76 FR at 48246 (tbl.V.D-9) (Pet.App.307a) (linking Maryland and New Jersey solely to Fairfield and New Haven, Connecticut), with CAJA2550 (projecting post-Rule air quality for Fairfield and New Haven superior to NAAQS).

Indeed, EPA imposed emission reductions with regard to locations that were expected to achieve attainment in the near future *even without any good-neighbor emission reductions* (typically because of other federal requirements, independent State regulation, and other undertakings by industry). In the Transport Rule, EPA found that numerous locations that were expected to have attainment or maintenance problems would achieve NAAQS by 2014 without any good-neighbor emission reductions. See 76 FR at 48308 (tbl.VIII.B-1) (Pet.App.596a–597a). For example, although Florida and South Carolina were "linked" only to certain receptors in Harris, Texas for ozone, *id.* 48246 (tbl.V.D-9) (Pet.App.306a, 308a), and although EPA projected those locations would have no attainment or maintenance problems in 2014 without any good-neighbor emission reductions,

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perience meteorological conditions "promoting ozone or fine particle formation." 76 FR at 48228 (Pet.App.213a).

CAJA2575–76, EPA still required Florida and South Carolina to adopt $500/ton emission controls in 2014.

Finally, that EPA overcontrolled is further confirmed by the fact that there has been widespread attainment of the NAAQS at issue in the Transport Rule under CAIR, yet the Transport Rule "mandates even greater reductions than have already occurred under CAIR." 76 FR at 70099; see CAJA1351–52, 1662–65, 1694; *2011 Progress Report* at 12, 14. By definition, the additional emission reductions required by the Transport Rule are not necessary to achieve downwind attainment of the NAAQS at issue in the rule in locations that are already achieving those standards at *current* upwind emission levels.[10]

4. There is also no merit to petitioners' suggestion that this overcontrol is necessary to ensure that some downwind locations attain NAAQS or to avoid the "risk" of undercontrol. EPA Br. 51–52; ALA Br. 45. *Chenery* bars these arguments as well because EPA never made any such findings in the Transport Rule. Nor could such findings have responsibly been made on this record. That one upwind State may need to be overcontrolled in the sense posited by EPA to ensure that a downwind location achieves attainment is not grounds for overcontrolling *other* upwind States that are not "linked" to that location.[11] Likewise, that a

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[10] That EPA has subsequently adopted stricter NAAQS for some of the pollutants at issue cannot justify the Transport Rule's overcontrol. See EPA Cert. Reply 3–4. EPA in the Transport Rule addressed only the existing NAAQS and rejected arguments that it should set regulatory obligations based on future NAAQS. 76 FR at 48218–19 (Pet.App.168a–170a).

[11] For example, Texas and South Carolina were each "linked" solely to a single downwind location that was projected to achieve air quality superior to the relevant NAAQS. See *supra*,

few locations may not achieve attainment after imposition of the Transport Rule's emission budgets provides no justification for overcontrolling other upwind States that are not "contribut[ing] significantly" to those locations. Cf. EPA Br. 53; ALA Br. 42.

Nor can EPA's failure to undertake the inquiry mandated by the statute be excused on the ground that the "web of interconnecting upwind/downwind linkages" made it too "comple[x]." EPA Br. 51. This finding was never made by the agency below, and like EPA's other *post hoc* assertions, is barred by *Chenery*. Regardless, EPA plotted cost curves and examined whether the emission reductions required at the cost points it chose produced attainment. It would not have been *any* more "complex" to determine whether the emission reductions required at lower cost points would also produce attainment. And to the extent avoiding overcontrol requires separate consideration of upwind States linked to different downwind locations, that analytical step does not introduce any substantial "complexity." EPA found it was feasible to consider different cost thresholds for different upwind States (and indeed did so for the higher cost points it chose). *Id.* 52–53; 76 FR at 48249, 48252 (Pet.App. 322a, 331a–332a).

Further, shortly after issuing the Transport Rule, EPA promulgated two different rules acknowledging unrelated errors in the Transport Rule that required EPA to increase many upwind States' emission budgets, some by a substantial amount. 77 FR 34830, 34838–42 (June 12, 2012); 77 FR 10324, 10326–29 (Feb. 21, 2012). EPA determined that the increased budgets would produce "no estimated changes in the

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19. That some other locations may not attain NAAQS provides no justification for overregulating Texas or South Carolina.

patterns of attainment, nonattainment, and maintenance" found in the Transport Rule. *Final June Revisions Rule Significant Contribution Assessment TSD* 4 (June 2012);[12] *Final Revisions Rule Significant Contribution Assessment TSD* 4 (Feb. 2012);[13] see also 77 FR at 34837 (finding that increased budgets produced only "minor changes in estimated air quality concentrations at the receptors to which the states in this rule were 'linked' in the final Transport Rule"). Thus, EPA's own actions establish both that the Transport Rule imposed emission-reduction obligations greater than necessary to achieve downwind attainment and that EPA is capable of assessing whether less stringent emission budgets could still achieve attainment.

B. EPA Improperly Relied On Cost Rather Than Each State's Relative Contribution To Downwind Air Quality To Define "Contribute Significantly."

The court of appeals also invalidated the Transport Rule because it defined each State's "significant contribution" without reference to the relative "amounts" of pollution each State contributes to downwind nonattainment. Pet.App.38a–39a. Specifically, EPA "define[d] each state's significant contribution ... as the emission reductions available at a particular cost threshold." 76 FR at 48248 (Pet.App.318a); see also *id.* 48260 (Pet.App.367a). Thus, EPA quantified a State's "significant contribution," not based on the "amounts" of emissions from the State that travel to

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[12] http://www.epa.gov/airtransport/CSAPR/pdfs/FinalJuneRevisionsRuleSignificantContributionAssessmentTSD.pdf

[13] http://www.epa.gov/airtransport/CSAPR/pdfs/Final%20Revisions%20Rule%20Significant%20Contribution%20Assessment%20TSD.pdf

the downwind location and adversely affect air quality there, but rather "based on the reductions [in a State's total emissions] achievable at a particular cost per ton." *Id.* 48270 (Pet.App.419a); see also *id.* 48303 (Pet.App.577a) ("a state's significant contribution to nonattainment or interference with maintenance is defined by EPA as all emissions that can be eliminated for a specific cost").

Petitioners contend that the court of appeals erred because the good-neighbor provision does not compel a "strict air quality-only methodological approach." EPA Br. 46; see also ALA Br. 39. In their view, the statute's "ambiguous and undefined terms" permit EPA to "conside[r] cost-effectiveness in defining significant contribution," and the court should have deferred to EPA's "reasonable construction." EPA Br. 44–45; see also ALA Br. 35–37.

Petitioners are wrong, and EPA's reading of the good-neighbor provision is entitled to no deference. "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). The good-neighbor provision requires each State to prohibit only those "amounts" of air pollution emitted within the State that "contribute significantly" to another State's nonattainment or "interfere" with another State's maintenance of NAAQS. 42 U.S.C. §7410(a)(2)(D)(i). By its terms, the statute focuses on the *effect* a State's emissions have on downwind air quality, not on the *cost* of reducing those emissions. EPA's assertion of broader authority to order whatever additional upwind reductions it deems "cost-effective" exceeds the fundamental statutory limits on its authority and must be rejected.

1. In determining whether EPA may consider costs in defining "contribute significantly," this Court does not write on a blank slate. The Court confronted a similar question in *Whitman* v. *American Trucking Associations*, 531 U.S. 457 (2001), which held that EPA may not consider costs in setting NAAQS under CAA §109(b). *Id.* 464–71. The Court emphasized that many other provisions of the CAA "explicitly permitted or required economic costs to be taken into account in implementing the air quality standards." *Id.* 467. The Court "therefore refused to find implicit in ambiguous sections of the CAA an authorization to consider costs that has elsewhere, and so often, been expressly granted." *Id.* Absent a "textual commitment of authority to the EPA to consider costs in setting NAAQS," the Court concluded that the CAA "unambiguously bars cost-consideration from the NAAQS-setting process, and thus ends the matter for us as well as the EPA." *Id.* 468, 471.

Accordingly, petitioners "must show a textual commitment of authority to EPA to consider costs" in defining "contribute significantly" under the good-neighbor provision. *Id.* 468. They cannot do so. The good-neighbor provision addresses only the "amounts" of "air pollutants" that "contribute significantly" to another State's nonattainment or "interfere" with another State's maintenance of NAAQS. The statutory text makes clear that the "amounts" of "air pollutants" each State is required to eliminate must be quantified based on the degree to which they affect another State's ability to attain or maintain NAAQS—*i.e.*, based on their effect on downwind air quality. Nowhere does the statute mention the cost-effectiveness of emission controls on upwind States.

This silence is telling: If Congress had intended EPA to consider costs in defining "contribute signifi-

cantly," surely it would have said so expressly, as it did in numerous other provisions of the Act. See *id.* 467. Indeed, there are hundreds of instances in which the term "cost" appears in the CAA, as well as numerous instances in which Congress specifically directed consideration of "cost-effectiveness," see, *e.g.*, 42 U.S.C. §§7404(a)(1), 7511b(d), 7628(a)(1)(A), 7651c(f)(1)(A), (B)(iv). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) (alteration and internal quotation marks omitted).

Petitioners largely ignore *American Trucking*, relying instead on *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009), to argue that agencies should be permitted to consider costs except where "expressly precluded by statute." EPA Br. 44.[14] But *Entergy* does not stand for that proposition, which would turn both *American Trucking* and ordinary principles of administrative law on their heads. See *Ethyl Corp.* v. *EPA*, 51 F.3d 1053, 1060 (D.C. Cir. 1995) ("To suggest ... that *Chevron* step two is implicated any time a statute does not expressly *negate* the existence of a claimed administrative power ... is both flatly unfaithful to the principles of administrative law ... and refuted by precedent.") (omissions in original).

Moreover, the provision in *Entergy* appeared in the Clean Water Act, not the CAA, and used language that comfortably accommodated cost considerations. See 556 U.S. at 218 ("one could certainly use the phrase 'best technology' to refer to that which pro-

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[14] That *American Trucking* "noted" the D.C. Circuit's decision in *Michigan*, EPA Br. 44, does not mean the Court approved it.

duces a good at the lowest per-unit cost"). In addition, the provision was "silent not only with respect to cost-benefit analysis but with respect to all potentially relevant factors." *Id.* 222. The good-neighbor provision, by contrast, contains no language that can reasonably be read to authorize EPA to consider costs in defining "contribute significantly," and it expressly identifies the only relevant factor—the extent to which the "amounts" of pollution from the upwind state affect downwind attainment. See 76 FR at 48216 (Pet.App.160a) (the good-neighbor provision "requires states to prohibit certain emissions *because of their impact on air quality in downwind states*") (emphasis added).

Further, EPA itself has explained that its role under the good-neighbor provision "is analogous to determining [NAAQS]." 63 FR at 57369. In the NO_x SIP Call, EPA emphasized that it must determine "the overall level of reductions" "by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section 110(a)(2)(D)," and then "it falls to the State to determine the appropriate mix of controls to achieve those reductions." *Id.* *American Trucking* found this same division of responsibilities supported the conclusion that costs may not be considered by EPA in setting NAAQS, but may be considered by States in determining how to "implement" NAAQS. 531 U.S. at 470–71; see *infra*, n.17.

Accordingly, as in *American Trucking*, the absence of textual authority to consider costs in defining "contribute significantly," when viewed in the "relevant 'statutory context'" of the CAA, "is best interpreted as limiting agency discretion." *Entergy*, 556 U.S. at 223.

2. Petitioners nevertheless contend that Congress implicitly authorized EPA to consider costs in defining "contribute significantly." But they make no

meaningful effort to analyze the statutory text or to explain how the provision, read as a whole, supports this interpretation. Instead, they attempt to find authorization to consider costs in a single word—"significantly." EPA Br. 43; ALA Br. 35.

In so doing, petitioners "mak[e] a fundamental mistake by divorcing the adverb 'significantly' from the verb it modifies, 'contribute,'" and then "compoun[d] their error by divorcing significantly from the rest of the statutory provision." *Michigan*, 213 F.3d at 696 (Sentelle, J., dissenting). The subject of the clause is the "amounts" of "air pollutants" emitted in the upwind State, and those "amounts" must "contribute significantly" to another State's nonattainment of NAAQS. The adverb "significantly" describes the degree to which the amounts of air pollutants "contribute" to downwind nonattainment, and the term "contribute" in this context means to "help to cause or bring about." *New Oxford American Dictionary* 378 (3d ed. 2010); cf. *Massachusetts* v. *EPA*, 549 U.S. 497, 532–33 (2007) (reading "contribute to" in 42 U.S.C. §7521(a)(1) as a causation standard).

The relevant question, therefore, is the extent to which the "amounts" of "air pollution" from an upwind State help cause or bring about another State's nonattainment of NAAQS. The answer depends on the quantity of emissions that travel to the downwind location and their qualitative impact on air quality there. While EPA no doubt has some latitude in determining when effects on downwind attainment are of sufficient magnitude to be deemed "significan[t]," there is no sense in which the effect of a given "amoun[t]" of air pollution on downwind air quality depends on the cost of emission controls. Just as the term "adequate" in CAA §109 does not authorize consideration of costs in setting NAAQS, *Am. Trucking*,

531 U.S. at 468, the term "significantly" cannot be plucked out of context and used to justify reliance on cost considerations that have no bearing on the degree to which an upwind State's emissions affect downwind attainment, see *City of Chi.* v. *Envtl. Def. Fund*, 511 U.S. 328, 339 (1994) (rejecting "the Solicitor General's plea for deference to the EPA's interpretation" because it went "beyond the scope of whatever ambiguity [the statute] contain[ed]"); *United States* v. *Home Concrete & Supply, LLC*, 132 S. Ct. 1836, 1846 n.1 (2012) (Scalia, J., concurring in part and in judgment) ("It does not matter whether the word 'yellow' is ambiguous when the agency has interpreted it to mean 'purple.'"). "Significant" cannot be read to mean "inexpensive to reduce."

The good-neighbor provision's focus on the causal relationship between upwind emissions and downwind air quality is further made clear by the "interfere with maintenance" prong, which "significantly" does not modify. In determining whether the "amounts" of "air pollutants" from an upwind State "interfere" with a downwind State's maintenance of NAAQS, petitioners can point to no textual basis whatsoever for the Transport Rule's reliance on costs, not even the fig leaf of "significantly." And petitioners offer no reason to suppose Congress authorized EPA to consider costs in assessing whether upwind emissions "contribute significantly to nonattainment," but not whether they "interfere with maintenance."

The good-neighbor provision's history makes clear that Congress did no such thing. When originally enacted in 1970, the good-neighbor provision required States to ensure that their emissions did "not interfere with the attainment or maintenance" of NAAQS by downwind States. 84 Stat. 1676, 1681 (1970). In 1977, Congress modified the text, requiring States to

prohibit emissions that would "prevent attainment or maintenance" of NAAQS by downwind States. 91 Stat. 685, 693 (1977). Neither of these predecessor versions of the good-neighbor provision contained any arguable textual basis for considering costs. And when Congress amended the good-neighbor provision to its current form in 1990, there is no indication that it intended the term "contribute significantly," which focuses on emissions contributing to downwind air quality, to grant EPA new authority to consider costs. Rather, the amendment was intended only to make clear that an upwind State's emissions need not be a "but for" cause of the downwind State's attainment problem. See S. Rep. No. 101-228, at 21 (1989).

Thus, EPA can read "costs" into the "contribute significantly" determination only by improperly isolating the term "significantly" from the remainder of the provision, ignoring the good-neighbor provision's statutory history, and disregarding this Court's precedents. As EPA has recognized before, an interpretation that "extrapolate[s] from isolated phrases" and "overlook[s] context" is "fundamentally unsound." EPA *Am. Trucking* (No. 99-1426) Br. 35. Just as the CAA "unambiguously bars cost considerations from the NAAQS-setting process," *Am. Trucking*, 531 U.S. at 471, it unambiguously bars cost considerations in defining "contribute significantly."

3. EPA's reliance on costs further conflicts with the statute's text and structure because it treats the same "amounts" of "air pollutants" differently based solely on the relative costs of emission controls in the contributing States. Under EPA's approach, the "amoun[t]" that a particular State is deemed to "contribute significantly to nonattainment" depends entirely on the amount of emissions it can eliminate at EPA's chosen cost threshold. See 76 FR at 48270

(Pet.App.419a). To the extent an upwind State can eliminate more emissions at that cost threshold than other upwind States that also "contribute" to the same downwind location, it has a greater reduction obligation, even if all the upwind States contribute the same "amounts" of "air pollutants" and those pollutants have the same effect on the downwind location's air quality.

Consequently, under EPA's approach, States that contribute identical "amounts" of air pollution to the same downwind location may be deemed to have substantially *different* "amounts" that "contribute significantly" based solely on EPA's views of their relative efficiencies in reducing air pollution. Indeed, a State that contributes only a relatively small amount of downwind air pollution may be deemed to have a substantially greater "significant contribution" than neighboring States that contribute substantially greater amounts of pollution to the very same location. See *Michigan*, 213 F.3d at 679 (requiring "small contributors" to "make reductions equivalent to those achieved by highly cost-effective measures" is an "ineluctabl[e]" feature of "EPA's uniform control strategy").

For example, as noted above, while Louisiana was projected to contribute greater amounts to Harris County's maintenance problems than Florida, Florida was required to reduce its NO_x emissions to a far greater extent than Louisiana. *Supra*, 8.[15] Similarly, even though South Carolina was linked only to Ful-

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[15] Indeed, the vast majority of the emission reductions expected at $500/ton were due to Florida's reductions alone. 76 FR at 48250–51 (tbl.VI.B-2) (Pet.App.327a–328a) (showing that all upwind States combined were expected to reduce ozone-season NOx emissions by approximately 19,000 tons, but Florida alone was expected to reduce by approximately 15,000 tons).

ton, Georgia for annual $PM_{2.5}$, 76 FR at 48241 (tbl.V.D-2) (Pet.App.278a), and was projected to contribute less than half as much as Alabama to that location, CAJA2706–07, South Carolina was required to reduce its SO_2 emissions by a greater percentage, and to a substantially lower absolute level, than Alabama, 76 FR 48261–62 (tbl.VI.D-3), 48305 (tbl.VIII.A-3) (Pet.App.377a–378a, 588a–589a) (requiring South Carolina to reduce emissions by 57.7% to 88,620 tons, while requiring Alabama to reduce by 48.9% to 213,258 tons).

But nothing in the good-neighbor provision permits EPA to increase emission-reduction obligations on one State merely because that State can reduce emissions more cheaply than another State. If that had been Congress' intent, it would have written a different statute. EPA proceeds as if the good-neighbor provision were a freestanding grant of authority to require States to "adopt such cost-effective emission controls as are necessary to ensure that interstate air pollution does not contribute significantly to any State's nonattainment of NAAQS." Regardless of the regulatory merits of EPA's approach, that is not the statute Congress wrote.

Instead, Congress placed the good-neighbor provision in §110 as a requirement governing each State's SIP, making clear that State boundaries cannot simply be ignored as inconvenient obstacles to regulatory efficiency. And it required each State to prohibit only those "amounts" of "air pollutants" that "contribute significantly to nonattainment" or "interfere with maintenance" of NAAQS by downwind States. Under EPA's approach, however, a State's reduction obligation depends on its relative efficiency compared to other States in eliminating air pollution, *not* the amount of pollution the State is actually contributing

to downwind attainment problems. EPA did not even measure how much each individual upwind State would be contributing after adoption of the Transport Rule's emission budgets. Pet.App.37a n.21; EPA CA Br. 33 n.20. Indeed, as the court of appeals recognized, EPA's methodology would allow it to "require a State to reduce *more than the State's total emissions that go out of State.*" Pet.App.38a n.23.[16] The court of appeals correctly held that EPA's approach violates the statute's plain terms and deserves no deference.

4. In setting cost-based emission budgets, EPA also "failed to take into account the downwind State's own fair share of the amount by which it exceeds the NAAQS." Pet.App.39a. Although the downwind States have the "primary responsibility" for achieving attainment, 42 U.S.C. §7407(a), EPA concluded that "a strategy based on adopting cost effective controls on sources of transported pollutants as a first step will produce a more *reasonable, equitable and optimal strategy than one beginning with local controls.*" 75 FR at 45226 (emphasis added). Thus, in projecting downwind air quality, EPA did not take into account "local control programs that may be necessary for areas to attain ... NAAQS," *id.* 45241, and it imposed strict upwind emission budgets even when it recognized that "local sources are at the heart of the ... problem," 76 FR 68699, 68703 (Nov. 7, 2011) (discussing Allegheny, Pennsylvania).

EPA claims this concern is "hypothetical" because the "contribution from the downwind State itself was

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[16] EPA's unsupported assertion that all in-State emissions travel beyond the State's borders, EPA Br. 48 n.14, does not answer the court of appeals' core concern. Under EPA's approach, a State that could eliminate 100% of its emissions at EPA's chosen cost threshold would be required to do so, regardless of its contribution to downwind nonattainment.

in *all* cases below" NAAQS, EPA Br. 48, and because upwind States were responsible for the vast majority of downwind attainment problems, *id.* 7–8; see also ALA Br. 17, 41. But EPA never made these findings in the rule, and for good reason: EPA's brief misinterprets the data on which it relies and, as a result, misstates the record. EPA argues that the tables in Appendix F to the Air Quality Modeling Technical Support Document (TSD) (JA177–85) show that the downwind State's own contribution was in all cases below NAAQS, but those tables *exclude* significant sources of in-State contribution, such as biogenic emissions, primary $PM_{2.5}$ emissions, and secondary organic aerosols. See CAJA2442–48.

Indeed, the exclusion of significant sources of contribution is confirmed by the fact that, based on the data in Appendix F, all downwind locations of concern would be *well below NAAQS even after adding the total contribution from all upwind States*, in which case there would be no basis to regulate upwind emissions. JA177–85 (showing aggregate emissions less than NAAQS attainment thresholds of 15 $\mu g/m^3$ for annual $PM_{2.5}$, 35 $\mu g/m^3$ for 24-hour $PM_{2.5}$, and 85 ppb for ozone). The tables in Appendix F are also inconsistent with the tables in Appendix B to the Air Quality Modeling TSD, which EPA used to determine the locations that are expected to have attainment problems. Compare *id.*, with CAJA2546–699 (showing 2012 base case average design values for the locations listed in Appendix F). And they conflict with EPA's finding that even after eliminating the upwind contribution, Lancaster and Allegheny Counties in Pennsylvania would not attain the 24-hour $PM_{2.5}$ NAAQS as a result of *local* emissions. See 76 FR at 48258–59 (Pet.App.361a–364a); cf. JA182

(Appendix F showing in-State contribution well below the 35 $\mu g/m^3$ attainment threshold for these counties).

5. Ultimately, EPA tries to justify its approach on two policy grounds. *First*, EPA claims that the court of appeals' approach is "not mathematically possible" when a State contributes to multiple downwind locations. EPA Br. 50. EPA, however, did not invoke mathematical impossibility during the rulemaking. Although it cited "technical difficulty" in determining each State's required reduction, EPA recognized that it was possible to set emission budgets based on each State's maximum downwind air-quality contribution to nonattainment or maintenance. CAJA2312; see 76 FR 48240 (tbl.V.D-1), 48242 (tbl.V.D-4), 48244–45 (tbl.V.D-7) (Pet.App.271a–273a, 282a–284a, 301a–302a) (listing maximum contributions for each pollutant). EPA rejected this approach because it could result in more reductions than necessary for each area to achieve attainment. CAJA2312; see EPA Br. 47–48. But EPA has not explained why, in the event of such overcontrol, it could not "ratchet back the upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States." Pet.App.28a.

In any event, the court of appeals fully understood that there are multiple overlapping linkages, and its ruling accounted for this fact. Pet.App.28a–29a. The court held that EPA was not required to "accomplish the ratcheting back in an entirely proportional manner" when it was "not ... possible" to do so, or to eliminate "over-control" when it was "unavoidable." *Id.* But EPA may not use the purported complexity of the problem as an excuse to abandon altogether the statute's requirement that "contribute significantly" be defined by each State's actual contribution to downwind nonattainment.

Second, EPA argues that the court of appeals' approach does not take into account the "different degrees of pollution-control progress" that States have made, and could potentially impose "large and expensive emission-reduction requirements on States whose sources were already well controlled." EPA Br. 49–50. In particular, EPA poses a hypothetical in which three upwind States contribute equal amounts to a downwind State's nonattainment but have made differing levels of investment in pollution controls. *Id.* 49. EPA contends that requiring all three States to make equivalent emission reductions would be inefficient because a State that had not previously invested in emission controls might be able to eliminate pollution more cheaply than a State that had already made such investments. *Id.*

Again, EPA's arguments only highlight its failure to "adhere to th[e] basic requirement of the statutory text." Pet.App.37a–38a. As discussed above, the good-neighbor provision does not permit EPA to deem the same "amounts" of air pollution from different upwind States to be simultaneously significant and insignificant depending on how much it would cost each State to eliminate them. Even as a policy matter, moreover, EPA never explains why it would be unfair to treat the same "amounts" of contribution by two States equally merely because one State had previously made investments to reduce its amount to the *same* level as a neighboring State. The neighboring State may have achieved lower "amounts" of emissions by mandating greater use of clean energy or undertaking policies that minimized energy consumption, or its economy may simply have a different industrial base—none of which makes it necessarily

more equitable, much less lawful, to require it to bear a portion of the first State's statutory burden.[17]

C. EPA Improperly Disregarded The Insignificance Threshold In Setting Emission Budgets.

1. The court of appeals also vacated the Transport Rule because EPA, having found that contributions below 1% of NAAQS did not "contribute significantly" to nonattainment, improperly disregarded that finding and set emission budgets without regard to whether they drove a State's emissions below the 1% insignificance threshold. Pet.App.31a–38a. Having "creat[ed] a floor below which 'amounts' of downwind pollution were not significant .... EPA could not then ignore that mark and redefine each State's 'significant contribution' in such a way that an upwind

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[17] Although not at issue here, petitioners are wrong in arguing that the fact that EPA cannot use cost to define a State's "significant contribution" means that costs can never be considered in this context. EPA Br. 46 n.13; ALA Br. 38 n.14. For example, costs may be considered in implementing EPA's emission budgets—*i.e.*, determining how to allocate among sources elimination of the "significant contribution" amount defined by EPA. See *Am. Trucking*, 531 U.S. at 470. Likewise, a SIP's good-neighbor provisions must be "consistent with the [other] provisions of this subchapter," 42 U.S.C. §7410(a)(2)(D)(i), which permit consideration of costs to limit the emission reductions that would otherwise be required to achieve air-quality goals, see, *e.g.*, 42 U.S.C. §7502(c)(1) (requiring State nonattainment plans to provide for "reasonably available control measures"); 40 C.F.R. §51.100(o)(2) ("reasonably available" requires consideration of "economic impact"); see also 42 U.S.C. §§7502(c)(2), 7509(d)(2), 7513(e). That Congress elsewhere gave EPA or the States general authority to consider costs in *ameliorating* undue regulatory burdens also underscores that EPA cannot rely on costs to define and *enlarge* a State's obligation under the good-neighbor provision to eliminate "significant contribution" solely because it would be relatively inexpensive for a State to comply.

State's required reductions could be *more* than its own significant contribution to a downwind State." *Id.* 36a.

This error flows largely from EPA's improper reliance on costs rather than air quality to define "contribute significantly" in setting emission budgets. Accordingly, the Court need not separately address the issue if it agrees that EPA may not consider costs in defining "contribute significantly." See *supra*, I.B. But even if costs may be considered, the court of appeals correctly held that EPA may not require a State to reduce its emissions below the level that EPA has determined does not "contribute significantly."

2. Petitioners do not present this issue fairly because they studiously ignore the operative language from the Transport Rule. One would never know by reading their briefs that EPA found that "states whose contributions are below th[e] [1%] thresholds *do not significantly contribute* to nonattainment or interfere with maintenance of the relevant NAAQS." 76 FR at 48236 (Pet.App.255a) (emphasis added); accord *id.* 48237 (Pet.App.256a). Nor would one know that EPA made the very same finding in the Transport Rule's predecessor, CAIR. 70 FR at 25188 ("[A]mbient impacts below the threshold mean that the upwind State's emissions do not contribute significantly to nonattainment."). Instead, petitioners invent a new nomenclature that never appeared in the Transport Rule, calling stage one "the screening analysis" and stage two "the control analysis." EPA Br. 10. But whatever their terminology, petitioners do not and cannot dispute that EPA expressly found that certain "amounts" of air pollutants were insignificant and then ignored that statutory boundary in determining the amount of reductions to order.

Because petitioners do not acknowledge what EPA found in the Transport Rule, they offer no objection to the court of appeals' reasoning. EPA Br. 54; ALA Br. 33. Instead, EPA tries to side-step the issue by saying that it did not "set out to regulate emissions that will contribute *in*significantly to downwind nonattainment" and that the court merely found that "the Rule does not eliminate that possibility." EPA Br. 54. From this premise, EPA argues that any such "incidenta[l]" overcontrol can be excused given the "complexit[y]" of the regulatory issue. *Id.* at 51, 54.

But the error the court of appeals identified does not turn on EPA's intent; nor is it "incidental." Rather, it reflects a fundamental flaw in EPA's methodology. Although EPA adopted a two-stage approach, both stages purported to define the very same thing: the "amounts" that "contribute significantly to nonattainment." Whether determining which States should be subject to emission controls or the level of those controls, the good-neighbor provision permits EPA to prohibit only those "amounts" of air pollution that "contribute significantly to nonattainment."

EPA, however, adopted inconsistent definitions *of the very same statutory language.* Pet.App.37a n.22. In the second stage, EPA defined each State's "significant contribution" based on cost without regard to the actual amounts of air pollutants that the State contributes, but in the first stage defined "amounts" that "contribute significantly to nonattainment" exclusively based on actual air pollutant amounts. Compare 76 FR at 48248 (Pet.App.318a) (EPA "define[d] each state's significant contribution ... as the emission reductions available at a particular cost threshold"), with *id.* 48236 (Pet.App.255a) ("states whose contributions are below these [air-quality] thresholds do not significantly contribute to nonat-

tainment"). No amount of "interpretive contortion" can allow EPA to "giv[e] the same word[s], *in the same statutory provision*, different meanings." *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (plurality).

3. Given the "illogi[c]" of EPA's conflicting definitions of "contribute significantly," Pet.App.37a n.22—such that air quality is the exclusive basis for determining whether an upwind State should be regulated but then entirely ignored when it comes to the extent of the regulation—EPA's two-stage approach cannot be saved merely by making *ad hoc* adjustments to emission budgets, as EPA suggests. EPA Br. 55. Nor does it matter whether some upwind States were forced to reduce their emissions below the 1% insignificance threshold. EPA cannot adopt an inherently inconsistent reading of the very same statutory text regardless of whether any particular State was driven below the insignificance threshold.

In all events, whether EPA required States to eliminate "amounts" that it had deemed insignificant is not "hypothetical." *Id.* 54. Rather, the extent to which this occurred is not *knowable* on the administrative record because EPA never measured how much any upwind State would be contributing after imposition of the Transport Rule's cost-based emission budgets. Pet.App.15a–17a; EPA CA Br. 33 n.20 ("this was not an issue EPA analyzed in a direct fashion for the Rule"). As the D.C. Circuit observed in *North Carolina*, "[w]hen a petitioner complains EPA is requiring a state to eliminate more than its significant contribution, it is inadequate for EPA to respond that it never measured individual states' significant contributions." 531 F.3d at 920.

Remarkably, having acknowledged that EPA did not determine the amounts that upwind States would be contributing to nonattainment after the imposition

of emission budgets, petitioners assert that it is "unlikely" that any upwind States were forced to reduce emissions below the insignificance threshold. EPA Br. 55; ALA Br. 33. The record indicates the opposite. In several instances, the Transport Rule required States that were contributing only slightly above the insignificance threshold to make substantial emission reductions. See, *e.g.*, 76 FR at 48240 (tbl.V.D-1) (Pet.App.273a) (showing Texas contribution of only 0.03 $\mu g/m^3$ above the insignificance threshold); *id.* 48245 (tbl.V.D-7) (Pet.App.302a) (showing South Carolina contribution of only 0.1 ppb above the insignificance threshold); *id.* 48261–63 (tbls.VI.D-3, VI.D-4) (Pet.App.377a–379a, 382a) (emission budgets). To the extent petitioners rely on calculations undertaken by EPA's lawyers in the court of appeals, such *post hoc* analysis is barred by *Chenery* and, in all events, the calculations did not measure the level of contribution post-Transport Rule for $PM_{2.5}$ or address ozone at all. See Industry/Labor CA Reply 5–6.

EPA seeks to excuse this failure by asserting that no party raised any concern about whether EPA's regulatory approach could force States to eliminate insignificant contributions. EPA Br. 54. But as explained above, the core error was not EPA's failure to make *ad hoc* adjustments to individual State emission budgets based on the 1% threshold, but its fundamentally flawed approach to defining "contribute significantly." And, as explained in greater detail below, commenters not only objected to EPA's approach, but also—specifically citing the 1% insignificance threshold—asked EPA to provide State-specific contribution data showing what reductions were necessary to eliminate significant contribution "without considering costs." JA240–41. EPA's response was to ignore the issue.

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For all of these reasons, the methodology EPA adopted in the Transport Rule is fundamentally inconsistent with the statutory limits on EPA's authority, and the court of appeals correctly concluded that the rule must be set aside. Pet.App.62a–63a. Without citing any authority, petitioners contend that EPA's errors support only targeted arbitrary-and-capricious challenges by affected States and not facial invalidation of the rule. EPA Br. 53, 55; ALA Br. 40. These arguments are meritless. Where, as here, an agency adopts a rule that is fundamentally at odds with the statute's terms, "a facial challenge is ... a proper response to the systemic disparity between the statutory standard and the [agency's] approach," and parties are not "compelled to raise a separate, as-applied challenge to the regulations." *Sullivan* v. *Zebley*, 493 U.S. 521, 537 n.18 (1990).

That is especially true here, given EPA's view that regulating interstate pollution under the good-neighbor provision requires an integrated analysis of a "web of interconnecting upwind/downwind linkages," EPA Br. 51, that must be considered comprehensively and not in piecemeal fashion based on State-specific, *ad hoc* adjustments. Because the errors the court of appeals identified permeate the rule, the Transport Rule should be vacated.

II. THE COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE CHALLENGES ON WHICH IT GRANTED RELIEF.

Petitioners do not dispute that the D.C. Circuit had jurisdiction to review the Transport Rule under CAA §307(b)(1). They argue, however, that the court exceeded its jurisdiction by considering the issues on which it granted relief, and that this Court should

not reach the merits of those issues, because they purportedly were not "raised with reasonable specificity" during the comment period as required by §307(d)(7)(B). EPA Br. 33–42; ALA Br. 28–35.

Petitioners' efforts to avoid a decision on the merits fail for three reasons. *First*, because §307(d)(7)(B)'s issue-exhaustion requirement is not jurisdictional, the court of appeals had jurisdiction to consider the issues on which it granted relief regardless of whether they were raised before EPA. *Second*, the court of appeals correctly held that the issues were raised with reasonable specificity during the comment period and did not abuse its discretion in deciding them even if they were not. *Third*, the issues are properly before this Court because they were passed upon below, and given their ongoing importance to the implementation of the good-neighbor provision, the Court should decide them now rather than needlessly perpetuate the legal uncertainty the Court granted certiorari to resolve.

1. In arguing that the court of appeals erred by reaching the merits of the issues on which it ruled, petitioners focus almost exclusively on whether the comments submitted to EPA satisfied the requirements of §307(d)(7)(B). In so doing, petitioners ignore the question on which this Court granted certiorari: "Whether the court of appeals lacked *jurisdiction* to consider the challenges on which it granted relief." EPA Pet. I (emphasis added). Although petitioners assert that the court of appeals exceeded its jurisdiction, EPA Br. 34; ALA Br. 28, they make no effort to show that §307(d)(7)(B) is a jurisdictional requirement.[18] For that reason alone, the Court should an-

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[18] EPA cites *National Association of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20,

swer the first question presented in the negative and proceed to the merits.

Even aside from petitioners' failure to address the question presented, it is clear that §307(d)(7)(B)'s issue-exhaustion requirement is nonjurisdictional. This Court has "'tried in recent cases to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). "To ward off profligate use of the term 'jurisdiction,' [the Court] ha[s] adopted a 'readily administrable bright line' for determining whether to classify a statutory limitation as jurisdictional": Absent a "clear statement" from Congress that a rule is jurisdictional, "'courts should treat the restriction as nonjurisdictional in character.'" *Id.* This rule applies to "threshold requirements that claimants must complete, or exhaust, before filing a lawsuit." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 166 (2010) (administrative exhaustion provision in Copyright Act is nonjurisdictional).

Section 307(d)(7)(B) contains no such jurisdictional clear statement. Jurisdictional statutes delineate the "classes of cases" a court may hear, *id.* 160, and restrict "'a court's adjudicatory authority,'" *Gonzalez* v. *Thaler*, 132 S. Ct. 641, 648 (2012). Section

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2013), for the proposition that the court lacks jurisdiction to consider an objection that was not raised before EPA. But neither that decision nor the case on which it relied contains any analysis of whether §307(d)(7)(B) is jurisdictional. See *id.* (citing *Portland Cement Ass'n* v. *EPA*, 665 F.3d 177, 185 (D.C. Cir. 2011)). This Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect.'" *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 511 (2006). ALA, for its part, does not even mention jurisdiction, merely asserting without explanation or citation of authority that the court is "authorized" to consider only those objections that were presented to the agency. ALA Br. 28.

307(d)(7)(B), by contrast, does not mention jurisdiction, does not define a class of cases the court may hear, and does not address the court's adjudicatory authority. Rather, by its terms, it addresses only the "objection[s]" that "may be raised during judicial review." This language speaks to the parties, not to courts. See EPA Br. 38 ("An 'objection' is made by a party in administrative proceedings, not by appellate judges reviewing them."). Because §307(d)(7)(B) limits the objections the parties may raise, not the issues the court may decide, it does not restrict the court's jurisdiction. See *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994) ("jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties'"); cf. *EEOC* v. *FLRA*, 476 U.S. 19, 23 (1986) (statute providing that no objection not presented to the agency "shall be considered by the court" spoke "to courts, not parties").

Any doubt on this score is put to rest by the fact that in another subsection of §307(d) Congress expressly required issue exhaustion as a condition of the court's power to grant relief, but only for *procedural* errors. See 42 U.S.C. §7607(d)(9)(D)(ii) (providing that the court "may reverse" the agency on procedural grounds "if ... the requirement of paragraph (7)(B) has been met"). By contrast, Congress did not require compliance with paragraph (7)(B) before a court "may reverse" agency action found to be arbitrary and capricious or in excess of statutory authority. *Id.* §7607(d)(9)(A), (C). If §307(d)(7)(B) by its own force restricted the court's jurisdiction, then the express requirement of compliance with §307(d)(7)(B) as a condition of the court's power to grant relief on procedural grounds would be surplusage, and no effect would be given to Congress's conspicuously different treatment of substantive errors. See *Gonzalez*,

132 S. Ct. at 649 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally ....") (alteration and internal quotation marks omitted).

Moreover, the legislative history of §307(d)(7)(B) shows that Congress intended to codify common-law issue exhaustion. "By and large," the House Report says, "[§307(d)] represents a legislative adoption of the suggestions for a rulemaking record set forth in a recent law review article." H.R. Rep. No. 94-1175, at 260 (1976). That law-review article, Pederson, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975), discusses common-law exhaustion and cites common-law cases, *id.* 76–77 & n.140 (citing *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 394 (D.C. Cir. 1973)). And like the trial-court preservation requirements from which it is derived, see *Sims* v. *Apfel*, 530 U.S. 103, 108–09 (2000), common-law administrative issue exhaustion has always been considered nonjurisdictional, see *id.* 106 n.1; *McKart* v. *United States*, 395 U.S. 185, 197–200 (1969); *Hormel* v. *Helvering*, 312 U.S. 552, 557 (1941).

Thus, far from reflecting a "clear statement" that Congress intended §307(d)(7)(B) to "rank as jurisdictional," *Sebelius*, 133 S. Ct. at 824, the statute's text and history reveal the opposite: Congress did not limit the court's jurisdiction to grant relief based on substantive agency errors, regardless of whether they were raised in comments before EPA.

2. Because §307(d)(7)(B) is nonjurisdictional, the answer to the first question presented is "no," and this Court need not address the separate, factbound question whether the comments submitted to EPA were sufficiently specific to preserve the issues. Indeed, because the latter issue is "outside the ques-

tions presented by the petition for certiorari," the Court should follow its "general rule" and decline to address it. *Glover* v. *United States*, 531 U.S. 198, 205 (2001); see Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court.").

That course is doubly warranted here because, in contrast to the waiver arguments it makes here, which have now mushroomed to fill nine pages of its brief, EPA barely even argued waiver below. With respect to the going-beyond-attainment issue, EPA addressed the merits of the argument head on without ever suggesting it was waived. EPA CA Br. 36–42. With respect to EPA's reliance on costs rather than relative contributions to downwind air quality to define "significant contribution," EPA acknowledged that commenters had raised the issue and merely complained that they had not done so "'forcefully,'" without actually contending that the argument was waived. *Id.* 21 n.11, 30 & n.16 (citing comments from Wisconsin, Connecticut, and Delaware). With respect to EPA's disregard of the 1% insignificance threshold, EPA suggested only that the argument "likely has been waived," but noted that Tennessee's comment was "arguably relevant." *Id.* 32 & n.18. And ALA did not argue waiver in its brief below at all. As a result, petitioners' waiver arguments should themselves be deemed waived. See *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982); *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976) (administrative exhaustion is subject to waiver).

Moreover, petitioners' contention that EPA did not have notice of the issues or an opportunity to address them, EPA Br. 35–36, ALA Br. 29–30, rings hollow. EPA has long recognized that it lacks authority to impose reductions that are greater than necessary to

resolve downwind attainment problems, see *supra*, 3, 5, yet here it refused to consider commenters' demonstration that lower cost thresholds would achieve attainment, 76 FR at 48257 (Pet.App.354a). Likewise, EPA has long interpreted the good-neighbor provision to permit the agency to define "contribute significantly" based on cost rather than each State's proportionate contribution to downwind air quality, EPA Br. 42, and EPA reiterated that interpretation here, rejecting an approach based on "'each State's individualized air quality impact on downwind nonattainment,'" 76 FR 48270–71 (Pet.App.418a–421a); CAJA2311–12. And in CAIR, EPA rejected the argument that it may not require States to reduce their emissions below the insignificance threshold. 70 FR at 25176–77. EPA has had more than "a fair opportunity to evaluate and choose among proposed alternative constructions" and "to avoid mistakes." EPA Br. 35–36.[19]

Particularly given this background, each of the issues on which the court of appeals granted relief was adequately presented to EPA during the comment period. As to going beyond attainment, commenters argued that EPA's cost thresholds were higher than necessary and presented data showing that most downwind locations could achieve attainment at lower cost thresholds—and indeed that most downwind locations were already in attainment as a result of CAIR's less stringent requirements. See CAJA1062–69, 1371–74, 1384–86, 1351–52, 1662–65, 1694, 1959. EPA addressed these comments as to NO_x, stating that it "did not find cost thresholds lower than

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[19] In any event, because the court of appeals' holdings are dictated by the statute's unambiguous text, EPA's interpretation is irrelevant. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

$500/ton for ozone-season NO_x to be reasonable" because they might cause some sources "to stop operating existing pollution control equipment." 76 FR at 48257 (Pet.App.354a). As noted, EPA never contended in the court of appeals that this objection had been waived; nor does ALA make that argument here. See ALA Br. 28–35.

As to proportionality, EPA expressly considered and rejected air-quality approaches, after soliciting the views of interested parties at the outset of the rulemaking. 75 FR at 45299; CAJA2307, 2311–12. Even after EPA had rejected these approaches in its notice of proposed rulemaking, commenters argued that EPA needed to rely on a State's physical contribution to downwind air quality rather than costs to define its "significant contribution." *E.g.*, CAJA1756 (Delaware comment arguing that "an upwind state's emissions contribution is significant or interferes with maintenance in a downwind state based on the emissions and their effect on air quality, and is independent of cost considerations"), 1971, 2007, 2056, 1755–56.[20] West Virginia even "request[ed] a tabular summary by state and pollutant that demonstrates the reductions necessary for each state to eliminate significant contribution and interference with maintenance (without considering costs)." JA240–41; see also CAJA1823 (similar request from Tennes-

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[20] There is no basis for EPA's assertion that Delaware's comment was merely "a policy 'opinion.'" EPA Br. 41. Delaware was expressing an "opinion" about the meaning of the statutory terms. CAJA1756 (opining on what significant contribution "is"). Nor does it matter whether Delaware supported greater or lesser upwind reductions. Either way, its comment put EPA on notice of a statutory objection to its reliance on costs to define significant contribution.

see).[21] Commenters also argued that a State's significant contribution depends on its contribution relative to those of other upwind States and the downwind State. CAJA903, 1060–62, 1519, 1634. And in the final rule, EPA yet again rejected air-quality approaches in favor of one that used costs to define "amounts" that "contribute significantly." 76 FR 48270–71 (Pet.App.418a–421a).[22]

As to EPA's disregard of the 1% insignificance threshold—the only issue as to which petitioners actually address the comments submitted during the rulemaking—petitioners fail to identify any error in the court of appeals' holding that the issue was adequately raised. Pet.App.32a n.18. Petitioners wrongly suggest the court held that §307(d)(7)(B) was satisfied solely by comments made in the predecessor

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[21] Contrary to EPA's assertion, EPA Br. 41, nothing prevents respondents from relying on additional comments such as West Virginia's that provide further support for respondents' showing below that the issues were preserved. Cf. *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

[22] ALA, but not EPA, mistakenly argues that the proportionality issue was not adequately raised in the briefs below. ALA Br. 34. Respondents argued repeatedly below that the statute required EPA to define each State's "significant contribution" based not on cost, but on the relative "amounts" of pollution it contributed to downwind nonattainment compared to other upwind States and the downwind State. Industry/Labor CA Br. 19–26, 33; Reply 4, 8–10. EPA acknowledged and responded to these arguments. EPA CA Br. 21–22 ("'Industry petitioners ... read [the good-neighbor provision] as prohibiting any consideration of costs or cost-effectiveness in determining what contributions are '"significant."'"); see also *id.* 18–19, 40 n.26. In any event, whether the issue was raised in the court of appeals implicates neither jurisdiction nor §307(d)(7)(B). The issue was passed upon and is properly before this Court for that reason alone, *United States* v. *Williams*, 504 U.S. 36, 41 (1992), and it is the question on which this Court granted certiorari.

CAIR rulemaking. EPA Br. 38–39; ALA Br. 31. In fact, the court properly considered comments made in the CAIR proceeding, along with *North Carolina*'s reasons for invalidating CAIR, as relevant *context* in finding that the comments submitted in the Transport Rule proceeding were "reasonabl[y] specifi[c]." See Pet.App.34a n.18.

In particular, the court of appeals evaluated the Transport Rule comments in light of the fact that EPA "considered—and rejected—precisely this same argument in CAIR." Pet.App.32a n.18. CAIR commenters argued "that the threshold contribution level selected by EPA should be considered a floor, so that upwind States should be obliged to reduce their emissions only to the level at which their contribution to downwind nonattainment does not exceed that threshold level." 70 FR at 25176–77. In issuing CAIR, EPA acknowledged and rejected this argument. *Id.* 25177; see also EPA Reh'g Pet. 11 (acknowledging that CAIR rejected this objection "for legal and policy reasons"). And EPA had another opportunity—indeed, an obligation—to revisit this issue after *North Carolina*, which held that once EPA defines each State's "significant contribution," it may not "require some states to exceed the mark." 531 F.3d at 921. As a result, *North Carolina* found that CAIR was "fundamentally flawed" and instructed "EPA [to] redo its analysis from the ground up." *Id.* 929.

In this context, Tennessee's and Wisconsin's comments were sufficiently specific to preserve the issue. Tennessee contended that EPA should not apply its uniform cost controls when doing so would "reduce [a State's] contribution below [the] 1% significance [threshold]." CAJA556. And Wisconsin argued that, in setting emission budgets, EPA had improperly abandoned the air-quality approach it had used to de-

termine which states were required to reduce emissions. CAJA1293.[23] Contrary to petitioners' contentions, EPA Br. 40–41, ALA Br. 32 n.12, there is no basis for dismissing these comments as mere policy arguments. Wisconsin expressly characterized its objection as "legal" in nature, CAJA1293, and Tennessee's comment that a State should not be required to reduce its "contribution below 1% significance," CAJA556, is fairly read as invoking EPA's lack of statutory authority to require reductions of amounts that do not "contribute significantly." Section 307(d)(7)(B) requires only "reasonable specificity." It does not require commenters to incant magic words.[24]

In any event, the court of appeals did not abuse its discretion in deciding these key statutory issues, even if they were not adequately raised before EPA. See, *e.g.*, *Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 818 (D.C. Cir. 1998) (holding the court may reach unexhausted arguments regarding "'key assumptions'" underlying EPA rules); cf. *McKart*, 395 U.S. at 197–99 (exhaustion not required where question was "solely one of statutory interpretation"). As discussed above, Congress expressly required issue exhaustion as a condition of the court's power to reverse agency action on *procedural* grounds, making clear that the court has discretion to reverse based on unexhausted *substantive* grounds. Compare 42 U.S.C. §7607(d)(9)(D)(ii), with *id.* §7607(d)(9)(A), (C). And

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[23] Wisconsin did not advocate "*more* stringent controls." EPA Br. 40. Wisconsin's proposed approach would have produced *less* stringent budgets where the agency had required a State to eliminate more than its significant contribution.

[24] Even if construed as making only "policy" arguments, Tennessee's and Wisconsin's comments would still support vacatur on the ground that EPA's use of inconsistent definitions of "contribute significantly" was arbitrary and capricious.

Congress modeled §307(d)(7)(B) on common-law preservation requirements, which courts have always had discretion to relax when circumstances warrant. See *Hormel*, 312 U.S. at 557; cf. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 487 (2008) ("when to deviate" from preservation rules is "a matter 'left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases'").

Given all the circumstances—the fact that EPA has squarely addressed the issues, the centrality of the issues to the statutory scheme, the inconsistency between EPA's approach and the court of appeals' mandate in *North Carolina*, petitioners' failure to argue waiver either at all or forcefully in their briefs below, and the fact that commenters did in fact raise the issues before EPA—the court of appeals did not abuse its discretion in resolving the issues it did.

3. In all events, this Court can and should decide the merits of the issues because they were passed upon below and have ongoing significance for the administration of the CAA.

This Court retains wide discretion to consider any issue that has been decided by a lower court, even if it was not properly raised by the litigants. See, *e.g.*, *Verizon Commc'ns, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002); *United States* v. *Williams*, 504 U.S. 36, 41 (1992). For example, in *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083 (1991), the court of appeals reached a statutory issue that had not been preserved during a civil trial in federal court. *Id.* 1099 n.8. This Court reached the issue as well, explaining that "[i]t suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration of federal law." *Id.* (internal citations and quota-

tion marks omitted); see also *PGA Tour, Inc.* v. *Martin*, 532 U.S. 661, 678 n.27 (2001); *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Likewise here, there are compelling reasons for this Court to review the merits of the D.C. Circuit's holdings. *First*, the issues have ongoing importance to the administration of the CAA. EPA has indicated that it intends to use the Transport Rule as a model for future rulemakings. EPA Cert. Pet. 12, 32. Thus, as EPA explained in urging the Court to grant review, the "importance" of the issues presented in this case "transcends the rulemaking at issue." *Id.* 32. In addition, even if this Court affirmed, EPA would still need to revise the Transport Rule in light of new air-quality data and revised NAAQS. See Industry/Labor Cert. Opp. 30–32. Declining to decide the merits of the issues here would merely delay their resolution, needlessly perpetuating uncertainty and creating further litigation. It is in everyone's interest to resolve the issues now, before EPA and regulated parties expend further efforts on yet another rule that must be vacated because EPA ignored the statutory limits on its authority.

Second, the issues were fully aired below, the court of appeals decided them in a thorough, reasoned opinion, and the parties have briefed the merits of the issues in this Court. And as discussed above, EPA has had ample opportunity to "'bring its expertise to bear'" on the issues in three separate rulemakings over more than a decade. Pet.App.32a n.18; cf. *Williams*, 504 U.S. at 44–45 (reaching an "important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue"). Further litigation is

therefore unlikely to aid this Court's resolution of the issues and would only waste this Court's resources as well as the parties'.

Third, the issues presented are pure questions of law and are squarely presented. No further factual development is necessary to assess whether EPA's methodology is consistent with the statutory limits on its authority. Petitioners complain that the purported lack of specific comments on the 1% threshold issue prevented EPA from evaluating the likelihood that any State was driven below the insignificance threshold and considering whether to adopt a "backstop mechanism." EPA Br. 37–38; ALA Br. 33. But commenters asked EPA to produce precisely this information. See JA240–41; CAJA1823. And petitioners ignore that EPA claims authority to use a methodology that sets emission budgets without regard to whether they drive a State's emissions below the insignificance threshold. See EPA Br. 54.

When confronted with the issue in CAIR, moreover, EPA did not analyze whether any State's emissions were driven below the insignificance threshold, belying any suggestion that it would have done so here had the issue been presented with even more specificity. See 70 FR at 25176–77.[25] Regardless, EPA's assertion of authority to require emission reductions below the level that EPA has determined does not

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[25] In CAIR, EPA *necessarily* required elimination of insignificant emissions because it imposed emission-reduction obligations on Minnesota even though Minnesota was contributing exactly at the insignificance threshold before imposition of CAIR budgets. See *North Carolina*, 531 F.3d at 926 (noting EPA in CAIR ultimately determined that Minnesota's expected "contribution was actually 0.20 $\mu g/m^3$, the exact threshold for inclusion"); *CAIR Response to Comments* 599–600 (corrected Apr. 2005), *available at* http://www.epa.gov/cair/pdfs/cair-rtc.pdf.

"contribute significantly" raises a basic question of statutory interpretation that is ripe for this Court's review. No purpose would be served by remanding the case to the D.C. Circuit without this Court's authoritative guidance on the scope of EPA's authority under the good-neighbor provision.

CONCLUSION

The judgment below should be affirmed.

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Nos. 12-1182 & 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

and

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Through its provisions governing "state implementation plans" ("SIPs"), the Clean Air Act gives States the first opportunity to satisfy, consistent with their unique regulatory agendas, the bottom-line air-quality obligations that EPA mandates. 42 U.S.C. § 7410(a). If the States fail to satisfy those obligations and certain other conditions are met, EPA may promulgate "federal implementation plans" ("FIPs"), which serve as federal backstops to satisfy EPA requirements that the States could have satisfied, but did not satisfy, in SIPs. *Id.* § 7410(c)(1). In the rule at issue here (the "Transport Rule," 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a)), EPA defined a new region of 27 upwind States and announced new obligations for those States to mitigate interstate transport of air pollution under the Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But instead of giving the Transport Rule States a chance to satisfy those new obligations through SIPs, EPA immediately imposed FIPs on all of them.

The questions presented are:

1. Whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule.

2. Whether the court of appeals correctly vacated the Transport Rule for imposing FIPs to implement obligations that EPA had not previously announced.

3. Whether the court of appeals correctly vacated the Transport Rule for exceeding the substantive limits of the good-neighbor provision.

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STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND

A. The Clean Air Act And Its Good-Neighbor Provision

1. Under the Clean Air Act, the prevention of air pollution has always been "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); *see id.* § 7407(a). As the Court explained in 1975, "[t]he Act gives [EPA] no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)]." *Train v. Natural Res. Defense Council, Inc.*, 421 U.S. 60, 79 (1975). The same is true today: EPA sets air-quality requirements, but the States get the first chance to implement those requirements through SIPs. *See* 42 U.S.C. §§ 7407(a), 7410(a).

The process begins with EPA announcing a national ambient air quality standard ("NAAQS") and designating geographic areas as "nonattainment," "attainment," or "unclassifiable" with respect to that NAAQS. *Id.* §§ 7407(c)–(d), 7409. After EPA promulgates a NAAQS, States have up to three years to submit SIPs that "provide[] for implementation, maintenance, and enforcement" of the NAAQS on an appropriate compliance schedule. *Id.* § 7410(a)(1), (a)(2)(A); *see* NY Br. 4 (explaining that a SIP is not a single document, but rather a "collection of state laws, regulations, and other measures").

After a SIP is submitted, EPA reviews it for compliance with the Act's requirements. 42 U.S.C. § 7410(k)(1)–(4). If a SIP meets the Act's requirements, EPA "shall approve" it. *Id.* § 7410(k)(3). If EPA later concludes that a previously approved SIP has become "substantially inadequate" to maintain the relevant NAAQS or fails to comply with any requirement of the Act, EPA "shall require the State to revise the [SIP] as necessary to correct such inadequacies." *Id.* § 7410(k)(5) (the "SIP call" provision).

EPA cannot impose a FIP unless it either disapproves a State's SIP submission or finds that a State has failed to make a SIP submission. *Id.* § 7410(c)(1). If EPA disapproves a State's SIP submission or issues a finding of failure to submit, EPA must issue a FIP within two years of that disapproval or finding. *Id.* But EPA's FIP authority is extinguished if the State "corrects the deficiency," and EPA approves the SIP or SIP revision, before a FIP is promulgated. *Id.*

2. The Clean Air Act requires SIPs to comply with the requirements of 42 U.S.C. § 7410(a)(2), including the requirements of the good-neighbor provision. As EPA explains, this provision evolved from a directive enacted 50 years ago to "encourage cooperative activities by the States and local governments for the prevention and control of air pollution," 42 U.S.C. § 1857a(a) (1964), to the more detailed provision that currently appears in section 7410(a)(2)(D)(i)(I). EPA Br. 3–5.

The earlier versions of the statute focused on localized interstate impacts. In 1977, for instance, the good-neighbor provision targeted emissions from "any stationary source" in one State that "will . . . prevent" attainment of a NAAQS in another State. 42 U.S.C. § 7410(a)(2)(E) (Supp. II 1977). This 1977 provision was designed to deal with NAAQS, like the one for sulfur dioxide ("SO_2"), that target pollution caused by emissions from a nearby source or a discrete group of nearby sources. *See Air Pollution Control Dist. v. EPA*, 739 F.2d 1071, 1075–76 (6th Cir. 1984); EPA Br. 4–5; ALA Br. 8–9. It was not helpful in maintaining air-quality standards for ozone and fine particle matter ("$PM_{2.5}$"). Addressing interstate transport of those pollutants requires a regional approach because ozone and $PM_{2.5}$ are formed through atmospheric migration and chemical transformation of "precursor" pollutants, such as nitrogen oxides ("NO_x") and SO_2, that are emitted by numerous mobile and stationary sources scattered over a large area. *See* EPA Br. 5–6 & n.3; NY Br. 9–10; Calpine Br. 48; Atmospheric Scientists' Amicus Br. 14.

The 1990 amendments to the Clean Air Act broadened the good-neighbor provision to better address this type of regional pollution while leaving "the division of responsibilities between EPA and the states in the section [74]10 process" unchanged. *Virginia v. EPA*, 108 F.3d 1397, 1410 (D.C. Cir. 1997). The statute now requires SIPs to

> contain adequate provisions—
>
> > (i) prohibiting, consistent with the provisions of this subchapter, any source . . . within the State from emitting any air pollutant in amounts which will—
> >
> > > (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any [NAAQS].

42 U.S.C. § 7410(a)(2)(D)(i)(I).

The Act does not define "contribute significantly" or "interfere." *See* EPA Br. 42; Calpine Br. 30. And because SO_2 and NO_x emissions can be transported great distances, transforming into ozone and $PM_{2.5}$ concentrations hundreds of miles downwind, determining the "amounts" of those pollutants that will "contribute significantly" to a State's nonattainment of air-quality standards for ozone and $PM_{2.5}$ is no simple task. *See, e.g.*, EPA Br. 6–7, 10–12, 46, 51–52; ALA Br. 15–20, 36; Calpine Br. 21–25, 48; Law Professors' Amicus Br. 25.[1]

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[1] This brief focuses on the "contribute significantly to nonattainment" element of the good-neighbor provision. The court of appeals did not reach the state and local respondents' challenge to the portions of the Transport Rule addressing the statute's "interfere with maintenance" language. *See* State & Local Respondents' Br. in Opp. 36–38 (noting this and other alternative grounds to affirm the court of appeals' judgment even if the Court accepts all of the petitioners' present contentions).

A separate portion of the 1990 amendments to the Act gives EPA a tool to accomplish that task with input from States. Section 7506a authorizes creation of a "transport region" and a "transport commission" comprised of state and federal officials who can work together, through use of section 7410(k)(5)'s SIP-call procedure, to "ensure that the plans for the relevant States meet the requirements of section 7410(a)(2)(D)." 42 U.S.C. § 7506a(a), (b)(1)–(2), (c).

But section 7506a is not the exclusive means of addressing interstate transport of air pollution, and it is not the statutory tool that EPA has used. Invoking its general rulemaking power, *id.* § 7601(a)(1), EPA has instead taken upon itself the complex task of assessing SO_2 and NO_x emissions in light of their impact on $PM_{2.5}$ and ozone concentrations in downwind States. That endeavor has produced three distinct rules, each imposing new emissions-reduction requirements on a different subset of upwind States and allowing differing degrees of state involvement.

B. EPA's Three Good-Neighbor-Provision Regional Programs[2]

1. The NO_x SIP Call

The 1998 NO_x SIP Call was EPA's first regional rule to address the States' good-neighbor obligations.

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[2] The appendix to this brief contains a fold-out timeline that illustrates EPA's regional good-neighbor rules and the SIP opportunities provided under each.

The rule proceeded in three steps. First, EPA used air-quality data to identify States with large NO_x emissions. 63 Fed. Reg. 57,356, 57,398 (Oct. 27, 1998). Second, EPA applied cost-effectiveness criteria to determine which States' emissions qualified as "significant[]" contributors to downwind nonattainment. *Id.* at 57,398. Finally, those States were given the opportunity to choose their preferred mix of emissions controls in SIPs. *Id.* at 57,368–70.

Under the regime that EPA initiated in the NO_x SIP Call, EPA determines the *amount* of pollution that upwind States must eliminate, while the States determine *how* to achieve those EPA-mandated reductions. *See id.* at 57,369 ("Once EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section [74]10(a)(2)(D)), it falls to the State to determine the appropriate mix of controls to achieve those reductions."); *id.* at 57,369–70 (noting that this approach allowed States to "choose from a broad[] menu of cost-effective, reasonable alternatives, including some . . . that may even be more advantageous in light of local concerns").

EPA insisted that it held the prerogative to quantify the States' good-neighbor obligations under 42 U.S.C. § 7410(a)(2)(D)(i)(I). *See id.* at 57,368–69 (rejecting the views of commenters who argued that "EPA's authority is limited to determining that the upwind States' SIPs are inadequate, and generally requiring the upwind States to submit SIP revisions

to correct the inadequacies"). EPA noted that section 7410(a)(2)(D) is "silent" on whether the States or EPA should determine the specific amount of emission reductions needed to avoid a "significant contribution" to interstate air pollution, and declared it "reasonable" to "include this determination among EPA's responsibilities." *Id.* at 57,369 (citing *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 468 U.S. 1227 (1984)).

EPA further recognized that it *needed* to quantify the States' good-neighbor obligations because without this determination from EPA, a State would be left to guess at what it means to "contribute significantly" to interstate air pollution under section 7410(a)(2)(D). *See id.* at 57,370 (noting that an "upwind State would not have guidance as to what is an acceptable submission"). Worse, States would "submit SIPs reflecting their conflicting interests," forcing EPA into issuing "SIP disapproval rulemakings in which EPA would need to define the requirements that each of those States would need to meet in their later, corrective SIPs." *Id.*

For these reasons, EPA sensibly announced the States' good-neighbor obligations up front, before the States would be required to submit their SIPs or SIP revisions for EPA approval. *See id.* at 57,362, 57,367, 57,369–70, 57,451. EPA then issued a SIP call under 42 U.S.C. § 7410(k)(5), giving the covered States 12 months to submit SIPs addressing the

1997 NAAQS for 8-hour ozone and revised SIPs to address the 1979 standard for 1-hour ozone.[3] *Id.*

The D.C. Circuit vacated the NO_x SIP Call in part after concluding that EPA had unlawfully included some States in the rule and had failed to give adequate notice of some elements of its final regulatory approach. *Michigan v. EPA*, 213 F.3d 663, 681–85, 691–93, 695 (D.C. Cir. 2000) (per curiam), *cert. denied*, 532 U.S. 904 (2001). But in the portion of the decision relevant here, the court confirmed that the Clean Air Act gives States "the primary responsibility to attain and maintain NAAQS within their borders" through SIPs. *Id.* at 671. The court deemed the NO_x SIP Call in keeping with EPA's statutory role, as it "merely provide[d] the levels to be achieved by state-determined compliance mechanisms." *Id.* at 687. The court explained that EPA's approach had given States "real choice" regarding how to comply with EPA's requirements, allowing them to "choose from a myriad of reasonably cost-effective options to achieve the assigned reduction levels." *Id.* at 687–88.

2. The Clean Air Interstate Rule ("CAIR")

CAIR was the second EPA regional rule addressing States' good-neighbor obligations. It sought to implement two 1997 NAAQS, one for 8-

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[3] "8-hour" and "1-hour" refer to the time over which concentrations of the targeted pollutant are averaged. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 483 (2001).

hour ozone and the other for annual $PM_{2.5}$. 70 Fed. Reg. 25,162, 25,168–69 (May 12, 2005). Like the NO_x SIP Call, CAIR quantified the States' good-neighbor obligations, and then allowed a period of time for States to revise their SIPs to comply with these newly announced requirements. *Id.* at 25,162, 25,263. CAIR ensured that "[e]ach State may independently determine which emissions sources to subject to controls, and which control measures to adopt." *Id.* at 25,165; *see also id.* (noting that this approach ensures "compliance flexibility" for the States); *id.* at 25,167 ("States have the flexibility to choose the measures to adopt to achieve the specified emissions reductions.").

CAIR reiterated that EPA does not expect the States to guess at the scope of their good-neighbor obligations in the absence of an EPA rule quantifying significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 25,265 n.116 (noting that EPA "does not expect States to make SIP submissions establishing emission controls for the purpose of addressing interstate transport without having adequate information available to them"); *see also* 77 Fed. Reg. 46,361, 46,363 n.7 (Aug. 3, 2012) (confirming that "section [74]10(a)(2)(D)(i) . . . contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution").

About one month before it issued CAIR, EPA issued a blanket finding that States had failed to submit SIPs to implement the 1997 NAAQS for

ozone and $PM_{2.5}$. *See* CADC Joint Appendix ("CAJA") 3,168–78. These findings triggered EPA's authority to impose FIPs on the States. *See* 42 U.S.C. § 7410(c)(1)(A). But EPA did not impose FIPs to implement the States' good-neighbor obligations at the time it promulgated CAIR. Instead, CAIR gave the States 18 months to submit SIPs to implement the good-neighbor obligations that EPA had just announced, 70 Fed. Reg. at 25,167, 25,176, explaining that the States could not be expected to have implemented the requirements of section 7410(a)(2)(D) before EPA quantified the States' good-neighbor obligations:

> In . . . today's action, we have provided States with a great deal of data and analysis concerning air quality and control costs, as well as policy judgments from EPA concerning the appropriate criteria for determining whether upwind sources contribute significantly to downwind nonattainment under section [74]10(a)(2)(D). We recognize that States would face great difficulties in developing transport SIPs to meet the requirements of today's action without these data and policies.

Id. at 25,268–69.[4]

The D.C. Circuit disapproved CAIR after finding its significant-contribution analysis invalid. *See North Carolina v. EPA*, 531 F.3d 896, 917–21 (D.C. Cir. 2008) (per curiam). The court also found that EPA had misconstrued section 7410(a)(2)(D)(i)(I) by failing to give independent effect to its "interfere with maintenance" language. *Id.* at 909–10, 929.

The court initially vacated CAIR and remanded it for EPA to cure "fundamental flaws" that would require re-evaluation of CAIR "from the ground up." *Id.* at 929, 930. But on rehearing, it granted EPA's request for remand without vacatur, explaining that this approach would "temporarily preserve" the environmental benefits of CAIR while EPA worked to promulgate a replacement rule. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam). EPA therefore left CAIR in place until it issued the Transport Rule in 2011, and the agency continued to approve CAIR-compliant SIPs even after the D.C. Circuit's decisions in *North Carolina*. *See, e.g.*, 74 Fed. Reg. 65,446 (Dec. 10, 2009); 74 Fed. Reg. 62,496 (Nov. 30, 2009); 74 Fed. Reg. 53,167 (Oct. 16, 2009); 74 Fed. Reg. 48,857 (Sept. 25, 2009);

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[4] Although EPA promulgated FIPs before CAIR's 18-month deadline for SIP submissions, it explained that those FIPs served only as a "[f]ederal backstop" and that they would not have effect until "a year after the CAIR SIP submission deadline." 71 Fed. Reg. 25,328, 25,328, 25,330–31 (Apr. 28, 2006).

74 Fed. Reg. 38,536 (Aug. 4, 2009). All of this led to significant and widespread attainment of NAAQS.[5]

3. The Cross-State Air Pollution Rule ("Transport Rule")

The 2011 Transport Rule was EPA's replacement for CAIR. *See* 76 Fed. Reg. at 48,211 (Pet. App. 134a–35a). In addition to implementing the 1997 annual $PM_{2.5}$ and 8-hour ozone NAAQS that CAIR had addressed, the Transport Rule imposed good-neighbor obligations for the 2006 daily $PM_{2.5}$ NAAQS on a new subset of States. *Id.* at 48,209 (Pet. App. 128–29a).

But the Transport Rule did not give the covered States a window in which to implement these newly announced good-neighbor obligations. Instead, it immediately imposed these requirements on the States through FIPs. This represented a sharp break from the approach that EPA had used in the NO_x SIP Call and CAIR. In each of those rules, EPA had quantified the States' good-neighbor obligations, but it refrained from imposing FIPs until the States were given an opportunity to meet their new obligations in SIPs. In the Transport Rule, by contrast, EPA imposed good-neighbor FIPs *immediately* upon informing the States what it

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[5] *See* EPA, Progress Report 2011: Environmental and Health Results Report 12, 14 (2013), *available at* http://www.epa.gov/airmarkets/progress/ARPCAIR11_downloads/ARPCAIR11_environmental_health.pdf ("2011 Progress Report"); *see also* Industry & Labor Respondents' Br. Part I.A.3.

means to "contribute significantly" to another State's nonattainment under section 7410(a)(2)(D)(i)(I). *Id.* at 48,209, 48,212, 48,219–20 & n.12 (Pet. App. 128a–29a, 138a–42a, 170a–72a & n.12).

Many upwind States had no idea that they needed to undertake *any* pollution-mitigation efforts under section 7410(a)(2)(D)(i)(I) until EPA finalized the Transport Rule. *Compare id.* at 48,212–14 (Pet. App. 142a–49a), *with* 75 Fed. Reg. 45,210, 45,215 (Aug. 2, 2010) (reflecting that the subset of States covered by the Transport Rule changed between the proposed and final rule), *and* 70 Fed. Reg. at 25,167 (reflecting that the subset of States covered by the final Transport Rule differed from the subset of States covered by CAIR). Yet the Transport Rule imposed 59 FIPs that specified exactly how the 27 covered States must meet the good-neighbor obligations that the Transport Rule had just quantified. *See* 76 Fed. Reg. at 48,213 (tbl. III–1), 48,219 n.12 (Pet. App. 143a–44a, 171a–72a n.12). And although the Transport Rule purported to allow States the opportunity to replace the EPA-imposed FIPs with SIPs, it did not allow a full SIP to replace a Transport Rule FIP until the 2014 control year. *See id.* at 48,326–32 (Pet. App. 669a–689a).

II. The Court Of Appeals' Opinion And The Petitioners' Claims

A. The D.C. Circuit vacated the Transport Rule for several reasons. First, the court of appeals found that EPA misconstrued section 7410(a)(2)(D)(i)(I) by requiring States to reduce their emissions by more

than their significant contributions to other States' nonattainment. *See* Pet. App. 3a–4a, 21a–41a. Second, the court of appeals found that EPA exceeded its statutory authority by imposing FIPs at the same time it quantified the States' significant contributions under section 7410(a)(2)(D)(i)(I). *See id.* at 4a, 42a–61a.

The court of appeals vacated both the Transport Rule and its FIPs, remanding the rule to EPA. *Id.* at 62a–64a. But as in *North Carolina*, the court of appeals ordered EPA to "continue administering CAIR pending the promulgation of a valid replacement." *Id.* at 63a–64a.

Judge Rogers dissented. She argued that some of the challenges to EPA's significant-contribution analysis had not been preserved before the agency and criticized some of the court of appeals' holdings on the merits. *Id.* at 65a, 67a–70a, 95a–114a. Judge Rogers also claimed that the challenge to the Transport Rule's FIPs was an impermissible collateral attack on prior EPA orders and argued, in the alternative, that the challenge should be rejected on the merits. *See id.* at 65a–67a, 70a–95a.

B. EPA (in No. 12-1182), along with ALA and four other environmental groups that intervened on EPA's behalf (in No. 12-1183), petitioned for certiorari. Briefs in support of certiorari were filed by a group of cities and States (led by New York) and two corporations (Calpine and Exelon), all of whom had supported EPA as intervenors in the court of

appeals. The Court granted the petitions but limited the questions to those presented by EPA.

In their merits-stage briefs, the petitioners and their supporters (both amici and a subset of the intervenors below) attack the court of appeals' jurisdiction as well as its analysis of the merits. The industry and labor respondents' brief addresses the issues surrounding the court of appeals' analysis of section 7410(a)(2)(D)(i)(I)'s substantive limits. This brief addresses the issues surrounding the scope of EPA's FIP authority.

SUMMARY OF THE ARGUMENT

The court of appeals had jurisdiction to decide whether EPA's Transport Rule could lawfully impose good-neighbor FIPs on the States. EPA tries to characterize this challenge to the Transport Rule as a jurisdictionally barred "collateral attack" on earlier agency actions that led EPA to issue the Transport Rule FIPs. But the state and local respondents are not challenging those earlier actions in this case, and their arguments in this case do not imply that those earlier agency decisions were unlawful. They are challenging the Transport Rule's issuance of FIPs to address obligations that did not exist at the time of those earlier actions, and for several of the state respondents, the predicate actions for the Transport Rule FIPs were made in the Transport Rule itself. Accordingly, even assuming this threshold challenge could properly be characterized as jurisdictional, it fails on multiple levels.

On the merits, the court of appeals was correct to vacate the FIPs in EPA's Transport Rule. There are two independent grounds on which this Court should affirm the court of appeals' judgment.

First, EPA's authority to impose FIPs for the 1997 NAAQS for ozone and $PM_{2.5}$ expired once EPA approved good-neighbor SIPs to implement those standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP "*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision*, before the Administrator promulgates such Federal implementation plan" (emphasis added)). EPA's attempt to retroactively revoke its approvals of those SIPs is not authorized by section 7410(k)(6) or any other provision of the Clean Air Act, and EPA's claim that those previously approved SIPs failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) is not a permissible construction of the statute. EPA had no authority to impose FIPs for the 1997 standards on the States that had EPA-approved good-neighbor SIPs in place, and because the Transport Rule FIPs are non-severable, the court of appeals properly vacated them across the board.

Second, EPA refused to quantify the States' good-neighbor obligations under section 7410(a)(2)(D)(i)(I) until the moment it issued the Transport Rule FIPs. This left the States to guess at how EPA might define the threshold for "significant[]" contributions during the SIP-submission process, and it left many States unaware of whether they needed to undertake

any pollution-abatement efforts as part of their good-neighbor obligations. EPA's actions deprived the Transport Rule States of the opportunity to stave off EPA-imposed FIPs by submitting approvable good-neighbor SIPs.

The FIP authority conferred by section 7410(c)(1) does not permit EPA to act in this manner. Rather, EPA's FIP authority is limited to implementing the SIP obligations in place at the time that EPA disapproves a State's SIP submission or issues a finding of failure to submit, and a FIP cannot be used to announce and impose new requirements that the States had no opportunity to implement during the SIP-submission process.

ARGUMENT

I. THE COURT OF APPEALS HAD JURISDICTION TO CONSIDER THE CHALLENGE TO EPA'S FIP-BEFORE-SIP APPROACH.

EPA contends that the court of appeals lacked jurisdiction to consider whether the Transport Rule could impose FIPs while simultaneously announcing the covered States' obligations under the good-neighbor provision. EPA Br. 15–16, 18–24; *see also* Pet. App. 66a–67a; 70a–82a (Rogers, J., dissenting). EPA insists that this represents a forbidden "collateral attack" on the SIP disapprovals that triggered EPA's FIP authority, rather than a challenge to the Transport Rule itself. EPA Br. 24.

In July 2011, *before* EPA issued its Transport Rule quantifying the States' good-neighbor

obligations regarding ozone and $PM_{2.5}$, EPA issued final rules disapproving SIPs submitted by ten States.[6] In disapproving those submissions, EPA specifically found that they failed to comply with the "good neighbor" requirements of section 7410(a)(2)(D)(i)(I) with regard to the 2006 daily $PM_{2.5}$ standard. *E.g.*, 76 Fed. Reg. at 43,130.

Of course, at that time, EPA had yet to quantify the States' good-neighbor obligations regarding this standard. The final Transport Rule would not be issued for another month, and although the proposed rule had already been published in the Federal Register, the rule's requirements and the States subject to the rule were subject to change (and ultimately did change) before the final rule was adopted. *See* 76 Fed. Reg. at 48,213–14 (Pet. App. 144a–50a) (noting some of the substantial changes between the Transport Rule's proposal and finalization). But EPA nevertheless disapproved the SIPs for non-compliance with the Act's good-neighbor provision, explaining that the rationale for this action could be found in the *proposed* Transport Rule. *See supra* n.6.

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[6] 76 Fed. Reg. 43,128 (July 20, 2011) (Alabama); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); 76 Fed. Reg. 43,175 (July 20, 2011) (Indiana); 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,136 (July 20, 2011) (Kentucky); 76 Fed. Reg. 43,156 (July 20, 2011) (Missouri); 76 Fed. Reg. 43,153 (July 20, 2011) (New Jersey and New York); 76 Fed. Reg. 43,167 (July 20, 2011) (North Carolina); 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio).

EPA had also found in June 2010 that 29 States and territories had failed to submit SIPs for enforcing their good-neighbor obligations under the 2006 daily $PM_{2.5}$ standard. 75 Fed. Reg. 32,673 (June 9, 2010). And in July 2011, EPA made a similar finding of failure to submit with regard to Tennessee. 76 Fed. Reg. 43,180 (July 20, 2011).

All of these SIP disapprovals and findings of failure to submit authorized and required EPA to issue FIPs. *See* 42 U.S.C. § 7410(c)(1).[7] But in this case, the States are not attacking *any* of these past SIP disapprovals or findings of failure to submit; they are attacking only the Transport Rule and its imposition of FIPs on the States. EPA tries to maintain that the States' challenge to the Transport Rule FIPs is really a challenge to the earlier agency actions that triggered EPA's FIP authority, but this collateral-attack argument should be rejected for three independent reasons.

First, a ruling from this Court that disapproves the Transport Rule FIPs does not compel the conclusion that EPA's earlier SIP disapprovals and findings of failure to submit were unlawful. The States acknowledge in this case that EPA's earlier

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[7] In separate proceedings, Ohio, Georgia, and Kansas challenged their SIP disapprovals. *Ohio v. EPA*, No. 11-3988 (6th Cir.); *Kansas v. EPA*, No. 12-1019 (D.C. Cir.); *Georgia v. EPA*, No. 11-1427 (D.C. Cir.). If those States can show in those proceedings that EPA's disapprovals of their SIPs were invalid, then those invalid actions would no longer serve as lawful predicates for FIPs.

SIP disapprovals and findings of failure to submit triggered its FIP authority under 42 U.S.C. § 7410(c)(1). The States are contesting only the *type* of FIPs that EPA could issue before the Transport Rule was promulgated. EPA could, for example, issue a FIP that implements EPA's previously announced good-neighbor requirements. What EPA cannot do is hide the ball by refusing to announce its interpretation of "contribute significantly," disapprove SIP submissions from States that have no idea how EPA intends to interpret that phrase, and then hold off on defining the covered States' obligations under section 7410(a)(2)(D)(i)(I) until it has issued FIPs imposing those obligations on the States.

The States' attacks on the Transport Rule FIPs also do not imply that EPA is powerless to enact those FIPs. Rather, those FIPs must issue *after* EPA has quantified the States' good-neighbor obligations and given the States a reasonable opportunity to meet those obligations in SIPs. *See* 42 U.S.C. § 7410(k)(5).

For example, EPA could have disapproved the SIP submissions (or issued findings of failure to submit) at time one, quantified the States' "good neighbor" obligations at time two, and imposed the Transport Rule FIPs at time three on any States that had not yet amended their SIPs to implement these EPA-announced good-neighbor requirements. A ruling from this Court that disapproves EPA's decision to issue the Transport Rule's FIPs

simultaneously with its announcement of the States' good-neighbor obligations does not imply that the SIP disapprovals issued at time one are unlawful. Those SIP disapprovals would still trigger a duty under section 7410(c)(1) to issue FIPs—but the *Transport Rule's* FIPs could be issued only *after* EPA defined the States' good-neighbor obligations and allowed the States a reasonable opportunity to implement those requirements through SIPs.

Second, even if EPA were correct to assert that the States' arguments logically imply that EPA's earlier SIP disapprovals were unlawful, that still would not represent a collateral attack on those earlier agency actions. The only remedy that the States are seeking from this Court is a judgment affirming the court of appeals' vacatur of the Transport Rule and its FIPs. They are not asking this Court to invalidate EPA's earlier SIP disapprovals and resurrect the SIPs that EPA had disapproved.[8]

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[8] EPA is also wrong to suggest that the court of appeals "exceeded its jurisdiction" by opining that EPA's prior SIP disapprovals and findings of failure to submit were invalid. EPA Br. 20. The judgment issued by the court of appeals did not vacate those earlier agency actions; it merely vacated the Transport Rule and the Transport Rule FIPs. Pet. App. 64a. A court does not collaterally attack a previous court ruling or agency action whenever its opinion claims that an earlier judicial or agency decision was wrongly decided; if that were true, then this Court could never write an opinion abrogating a court of appeals ruling from which the losing party declined to petition for certiorari or a district court ruling from which the

Third, EPA's collateral-attack argument cannot overcome the fact that EPA *approved* 22 States' SIP submissions for the 1997 ozone and $PM_{2.5}$ standards before EPA issued the Transport Rule. *See* 76 Fed. Reg. at 48,220–21 (Pet. App. 177a–83a) (citing EPA's approval of CAIR SIPs submitted by Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia). EPA approved these submissions after its 2005 blanket finding of failure to submit SIPs for the 1997 standards. *See* 70 Fed. Reg. 21,147 (Apr. 25, 2005). The States contend that those pre-Transport Rule SIP approvals terminated EPA's authority to impose FIPs on those States for the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose FIPs after issuing findings of failure to submit "unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan"); Part II.A, *infra*.

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losing party declined to appeal. *But see, e.g.*, *Millbrook v. United States*, 133 S. Ct. 1441 (2013) (abrogating *Orsay v. U.S. DOJ*, 289 F.3d 1125 (9th Cir. 2002)). The time limits in section 7607(b)(1) are transgressed only when a court's *judgment* purports to vacate or alter an agency action outside the scope of a timely filed petition for review.

This particular attack on EPA's FIPs cannot be characterized as a "collateral attack" against the finding of failure to submit that EPA issued in 2005. The FIPs that EPA imposed on this subset of States are unlawful *regardless* of the legality of EPA's 2005 finding of failure because EPA's FIP authority with regard to those States expired when EPA approved their SIP submissions. To be sure, EPA denies that those SIP approvals terminated its FIP authority, *see* 76 Fed. Reg. at 48,219 (Pet. App. 172a–73a), but the courts surely can resolve *that* disagreement without launching a collateral attack on EPA's finding of failure to submit.

Moreover, the Transport Rule's FIPs are non-severable. As the petitioners themselves explain, the States' good-neighbor obligations are intertwined with other States' obligations under the 1997 and 2006 standards. *See* EPA Br. 45–53; ALA Br. 39–41; *see also* Calpine Br. 47–54; 76 Fed. Reg. at 48,252–53 (tbl. VI.B–3 & n.a) (Pet. App. 335a–37a) (reflecting EPA's conclusion that Transport Rule FIPs requiring more stringent emissions reductions in some States than others will cause emissions shifting, resulting in greater emissions in States whose Transport Rule FIPs are more lenient); *cf. North Carolina*, 531 F.3d at 929 (noting that the components of CAIR "must stand or fall together"). This non-severability enables the Court to resolve the legality of the entire Transport Rule even if it concludes that some of the States' challenges were untimely.

Finally, even if EPA were correct to characterize the States' challenge to the Transport Rule FIPs as a collateral attack on earlier agency actions, that characterization would not have jurisdictional implications. The premise of EPA's jurisdictional argument is that any collateral attack on EPA's SIP disapprovals or findings of failure to submit is jurisdictionally out of time because section 7607(b)(1) requires petitions for review of those decisions to be filed within 60 days of the decision. But section 7607(b)(1) is not phrased in jurisdictional terms. *See* 42 U.S.C. § 7607(b)(1) ("Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal Register . . . ."). And the only authority EPA cites for the idea that section 7607(b)(1) establishes a jurisdictional time limit comes from the D.C. Circuit, not from this Court. *See* EPA Br. 19 (citing *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998)).

Recent decisions of this Court make clear that the filing deadlines in section 7607(b)(1) do not establish jurisdictional limits on the federal courts. *See, e.g.*, *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202–03 (2011) (holding that a 120-day deadline on filing appeals to the Veterans Court is non-jurisdictional); *id.* at 1203 ("Filing deadlines, such as the 120-day filing deadline at issue here, are quintessential claim-processing rules."); *Kontrick v. Ryan*, 540 U.S. 443, 454–55, (2004) (holding that filing deadlines in the Bankruptcy Code are "claim-processing rules"

rather than jurisdictional time limits). The jurisprudence of the D.C. Circuit on this matter is out of step with this Court. And so is EPA's argument that the court of appeals lacked jurisdiction to consider the arguments of the state and local respondents.

II. The Court Of Appeals Correctly Held That EPA Lacked Authority To Impose The Transport Rule FIPs.

A. EPA Had No Authority To Impose Transport Rule FIPs On The 22 States With EPA-Approved SIPs For The 1997 Ozone And $PM_{2.5}$ NAAQS.

After EPA promulgated CAIR, States submitted SIPs to implement the good-neighbor obligations for the 1997 ozone and $PM_{2.5}$ standards. *See, e.g.*, 72 Fed. Reg. 55,659 (Oct. 1, 2007). By the time EPA issued the Transport Rule, EPA had approved good-neighbor SIPs submitted by 22 States. *See* 76 Fed. Reg. at 48,220–21 (Pet. App. 177a–83a). This revoked EPA's authority to impose FIPs on those States with regard to the 1997 standards. *See* 42 U.S.C. § 7410(c)(1) (authorizing EPA to impose a FIP "*unless the State corrects the deficiency, and the Administrator approves the plan or plan revision*, before the Administrator promulgates such Federal implementation plan" (emphasis added)).

The Transport Rule, however, imposed at least one FIP with regard to the 1997 standards on all but three of those 22 States whose good-neighbor SIPs

for the 1997 standards had previously been approved. *See* 76 Fed. Reg. at 48,213 (tbl. III–1), 48,219 n.12 (Pet. App. 143a–44a, 171a–72a n.12) (reflecting EPA's ultimate conclusion that each of these States except Connecticut, Massachusetts, and Minnesota would be covered by one or more Transport Rule FIPs as to the 1997 NAAQS). In all, 31 of the Transport Rule's 59 FIPs implement good-neighbor obligations under the 1997 standards for States whose CAIR SIPs addressing those standards had previously been approved. *Id.* (further reflecting that 14 of those 31 FIPs were imposed on the eight state respondents whose CAIR SIPs had previously been approved, *see id.* at 48,220–21 (Pet. App. 178a–83a); EPA Br. (II)).

EPA had no authority to impose a FIP that implements the 1997 standards on any of those States because its FIP authority for the 1997 standards expired once EPA approved the good-neighbor SIP submissions from those States.[9] Even

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[9] For the reasons discussed in Parts II.B and II.C, *infra*, EPA also lacked authority to impose Transport Rule FIPs implementing the 1997 standards on Michigan, New Jersey, Tennessee, Texas, and Wisconsin, all of which were governed by CAIR FIPs when EPA issued the Transport Rule. *See* CAJA 3,172, 3,174, 3,176–78 (explaining that the abbreviated CAIR SIPs that EPA approved for these States "modified but did not replace the CAIR FIPs"). Because a FIP may not impose obligations that were not disclosed in time to be addressed in a SIP, EPA could not replace the CAIR FIPs for these States with Transport Rule FIPs without providing an opportunity to submit SIPs addressing the new obligations disclosed in the Transport Rule.

if one assumes, for the sake of argument, that EPA could impose FIPs to implement the 2006 $PM_{2.5}$ standard on the States subject to the Transport Rule, EPA had no authority to impose a FIP that implements the 1997 ozone or $PM_{2.5}$ standards on Alabama, Arkansas, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, or West Virginia. And because the FIPs imposed by the Transport Rule are non-severable, *see supra* p. 23, this Court should affirm the court of appeals' judgment vacating all of the Transport Rule's FIPs.

EPA was well aware that its prior approval of these good-neighbor SIPs presented a problem under the "unless" clause of 42 U.S.C. § 7410(c)(1). *See* 76 Fed. Reg. at 48,219 (Pet. App. 172a–73) (acknowledging commentators who argued that EPA lacked authority to impose FIPs on States with EPA-approved SIPs for the 1997 ozone and $PM_{2.5}$ standards). The Transport Rule tried to obviate the "unless" clause by deploying two dubious maneuvers. First, EPA attempted to retroactively revoke its approval of the States' SIP submissions under section 7410(k)(6). *See id.* at 48,217, 48,219 (Pet. App. 162a, 173a–74a). Second, EPA argued that the approved SIP submissions failed to "correct[] the deficiency" that had prompted EPA to issue findings of failure to submit. *See id.* at 48,219 (Pet. App.

173a). None of this can salvage the Transport Rule FIPs.

1. EPA Had No Authority To Retroactively Disapprove The SIPs That It Had Previously Approved.

EPA claims that section 7410(k)(6) allowed it to retroactively disapprove the good-neighbor SIPs that it had previously approved. *See* EPA Br. 33. Section 7410(k)(6), entitled "Corrections," provides:

> Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification *was in error*, the Administrator may *in the same manner as the approval, disapproval, or promulgation* revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.

42 U.S.C. § 7410(k)(6) (emphases added). EPA thought that it could invoke section 7410(k)(6) because its previous SIP approvals had been issued under CAIR and the D.C. Circuit later disapproved CAIR's interpretation of the States' good-neighbor obligations in *North Carolina*. EPA's use of section

7410(k)(6) was unlawful for two independent reasons.

First, section 7410(k)(6) allows "corrections" only when a past EPA action "*was* in error," meaning that the action was erroneous based on the law in existence *at that time*. Section 7410(k)(6) cannot be used to revoke a SIP approval on account of subsequent developments in judicial doctrine or agency rulemaking. That is the office of section 7410(k)(5), which requires EPA to issue a "SIP call" whenever it determines that a SIP is "substantially inadequate to attain or maintain the relevant [NAAQS] . . . or to otherwise comply with any requirement of this chapter."

EPA now insists that section 7410(k)(6) empowers the agency to revoke an earlier SIP approval as "error" by relying on new developments that post-date the approval. EPA Br. 32–33 & n.11.[10] EPA appears to be saying that it could approve 50 SIP submissions at time one, change its interpretation of the good-neighbor requirements at time two, and then immediately revoke the earlier SIP approvals under section 7410(k)(6) and impose FIPs on all 50

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[10] It is noteworthy, however, that EPA did not stop approving CAIR SIPs when *North Carolina* was decided. Seven of the subsequently "corrected" CAIR SIP approvals post-date the D.C. Circuit's 2008 decisions in that case. *See* 76 Fed. Reg. at 48,221 (Pet. App. 180a–83a) (citing post-*North Carolina* CAIR SIP approvals for Indiana, Maryland, North Carolina, Ohio, Pennsylvania, South Carolina, and West Virginia).

States. This is a manifestly implausible construction of the phrase "was in error."

To begin, EPA's interpretation of section 7410(k)(6) allows the Transport Rule to apply retroactively by "altering the past legal consequences of past actions." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 219 (1988) (Scalia, J., concurring) (emphasis omitted). When EPA approved the States' SIP submissions, it terminated its authority to issue FIPs for those States as to the 1997 ozone and $PM_{2.5}$ standards. *See* 42 U.S.C. § 7410(c)(1). The Transport Rule, however, altered the past legal consequences of those agency actions, as those "approvals" are now deemed to have prolonged, rather than terminated, EPA's authority to impose FIPs.

This contradicts *Bowen*, which forbids agencies to engage in retroactive rulemaking absent clear and unambiguous statutory authorization. 488 U.S. at 208. It also contradicts the Administrative Procedure Act, which defines "rule" as "an agency statement of general or particular applicability *and future effect*." 5 U.S.C. § 551(4) (emphasis added). Nothing in the Clean Air Act authorizes retroactive rulemaking in a manner sufficient to satisfy *Bowen* or the clear-statement requirement of 5 U.S.C. § 559.

EPA's construction of the word "error" also cannot be reconciled with section 7410(k)(5)'s mandatory SIP-call provision. Section 7410(k)(5) provides that EPA "shall" issue a SIP call whenever it finds that a SIP is "substantially inadequate" to maintain a

NAAQS or comply with any requirement of the Clean Air Act. This process requires EPA to "notify the State of the inadequacies" and provide an opportunity for the State to submit a revised SIP; a FIP cannot be imposed until *after* EPA finds that the State has failed to submit the necessary SIP revisions. *See* 42 U.S.C. §§ 7410(c)(1), 7410(k)(5).

EPA's understanding of the word "error" extends section 7410(k)(6)'s correction power to every circumstance described in section 7410(k)(5). Any time the agency discovers that an EPA-approved SIP is "inadequate" to comply with the agency's current understandings of the Clean Air Act, EPA can simply declare its earlier approval to be "in error" and immediately impose a FIP without using any of the procedures required by section 7410(k)(5). This renders the mandatory language of section 7410(k)(5) meaningless, and makes hash of the procedural protections that section 7410(k)(5) confers on the States. There *must* be a distinction between the "inadequac[ies]" described in section 7410(k)(5) and the "error[s]" described in section 7410(k)(6), yet EPA's construction of the statute treats these as fungible commodities.[11]

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[11] As one prominent commenter on the 1990 amendments to the Clean Air Act has explained, section 7410(k)(6) was intended merely to "enable EPA to deal promptly with clerical errors or technical errors. It [wa]s not intended to offer a route for EPA to reevaluate its policy judgements." Henry A. Waxman, et al., *Roadmap to Title I of the Clean Air Act Amendments of 1990:*

Finally, EPA cannot overcome the fact that its SIP approvals were not "in error" at the time that EPA approved the SIPs. Agencies are required to base their decisions on the administrative rules in existence at the time of agency action. *See Bowen*, 488 U.S. at 208 (forbidding retroactive rulemaking absent clear and unambiguous statutory authorization); *Ariz. Grocery Co. v. Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370, 390 (1932) (forbidding agencies to change rules in an adjudication). It is not "error" for an agency to fail to foresee that a future decision of the D.C. Circuit will disapprove the governing agency rule. Nor is it "error" to fail to foresee that a future administration will adopt a more stringent interpretation of the good-neighbor requirement. The word "error" implies fault, and no human being can know future events. One cannot impose fault on an agency administrator—and accuse him of "error"—for failing to undertake a task that is beyond human capacity.

Even if this Court were to accept EPA's interpretation of the word "error," the Transport Rule's use of section 7410(k)(6) would remain unlawful for another, independent reason. Any revisions of past agency action must be made "in the same manner as" the putative erroneous action. 42 U.S.C. § 7410(k)(6). And although EPA issued its SIP approvals through notice-and-comment

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Bringing Blue Skies Back to America's Cities, 21 ENVTL. L. 1843, 1924–25 (1991).

rulemaking, its "corrections" did not go through that process. 76 Fed. Reg. at 48,221 (Pet. App. 183a–84a) ("EPA is taking this final action without prior opportunity for notice and comment . . . .").

EPA tries to excuse its failure to follow this statutory command by invoking the "good cause" exception of 5 U.S.C. § 553(b)(B). 76 Fed. Reg. at 48,221–22 (Pet. App. 184a). That is a non sequitur. EPA's obligation to use notice and comment for its "corrections" comes from *two* independent sources: 5 U.S.C. § 553(b), which is subject to a "good cause" exception, and 42 U.S.C. § 7410(k)(6), which is not. The state and local respondents are not accusing EPA of violating the Administrative Procedure Act by failing to use notice and comment; they are accusing EPA of violating the Clean Air Act. Agencies do not have a good-cause license to violate their organic statutes.

New York suggests that this Court should overlook EPA's unlawful use of section 7410(k)(6)'s "corrections" power because "the court of appeals did not address this issue . . . and it is not fairly raised by the questions on which this Court granted certiorari." NY Br. 26 n.17; *see also* ALA Br. 47 n.16. But EPA makes no such claim, and for good reason. This Court may review issues "pressed *or* passed upon" in the courts below, *see Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (citation and internal quotation marks omitted), and while New York correctly observes that the section-7410(k)(6) issues were not fully "passed upon" by the court of

appeals, they were most assuredly "pressed." *See* State & Local Respondents' CADC Br. 24–29; *see also Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979) ("As the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.").

As for whether section 7410(k)(6) falls within the scope of the questions presented, the issue need only be "fairly included," SUP. CT. R. 14.1(a); *see also Yee v. Escondido*, 503 U.S. 519, 535 (1992), and New York does not explain how the section-7410(k)(6) issues fail to satisfy this standard. The questions presented include "[w]hether States are excused from adopting SIPs prohibiting emissions that 'contribute significantly' to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations." EPA Cert. Pet. (I). EPA contends that the answer is "no," but it cannot show that the States with EPA-approved good-neighbor SIPs for the 1997 standards were required to adopt new good-neighbor SIPs unless it also shows that its invocation of section 7410(k)(6) was lawful.[12]

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[12] Even though the court of appeals declined to resolve whether EPA lawfully used section 7410(k)(6) to revoke its earlier SIP approvals, the court at least resolved whether EPA may invoke those "corrections" powers *on the same day* that it issues FIPs, depriving the States of any opportunity to adopt a SIP that

2. EPA's "Correct the Deficiency" Argument Is Meritless.

EPA believes that it can impose FIPs on States with EPA-approved SIPs even apart from its "corrections" power under section 7410(k)(6). EPA notes that the "unless" clause of section 7410(c)(1) kicks in only when *two* conditions are satisfied: the State must "correct[] the deficiency," *and* EPA must "approve[] the plan or plan revision," before EPA issues the FIP. EPA contends that the SIPs it approved failed to "correct[] the deficiency" within the meaning of section 7410(c)(1) and therefore did not terminate EPA's FIP authority. EPA Br. 32–33; 76 Fed. Reg. at 48,219 (Pet. App. 172a–73a).

EPA relies on the same reasons it gave for invoking its "corrections" power under section 7410(k)(6): namely, that the EPA-approved SIPs became tainted when the D.C. Circuit issued its initial ruling in *North Carolina*. In EPA's view, as soon as the D.C. Circuit disapproved CAIR's interpretation of the good-neighbor requirement, the SIPs that EPA approved in reliance on CAIR were no longer adequate to "correct[] the deficiency" within the meaning of section 7410(c)(1). EPA Br. 32–33; 76 Fed. Reg. at 48,219 (Pet. App. 173a). EPA's interpretation of "correct the deficiency" is not tenable.

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would avoid an EPA-imposed FIP. *See* Pet. App. 45a. The legality of *that* use of section 7410(k)(6) is assuredly before this Court.

The "correct the deficiency" phrase in section 7410(c)(1) uses a definite article: "*the* deficiency." This refers to the deficiency that caused EPA to disapprove the SIP or find that a State had failed to submit a SIP. It cannot refer to a "deficiency" that arises only upon later developments in judicial doctrine or administrative rulemaking. A State "corrects *the* deficiency" by submitting a new SIP that responds to the concerns that prompted EPA to act under subsection (A) or (B) and that complies with every reasonably knowable legal obligation at the time of EPA's disapproval or finding of failure. Every SIP that EPA approved before the ruling in *North Carolina* satisfies the "correct[] the deficiency" clause and terminates EPA's FIP authority.

EPA's construction of section 7410(c)(1) re-writes the "correct the deficiency" clause to require a State to "correct all deficiencies that are known at this time and that may become known in the future." This interpretation not only departs from the natural reading of the text, but it also renders the "unless" clause useless in constraining EPA's power. Anytime EPA approves a SIP under the "unless" clause of section 7410(c)(1), EPA can resurrect its FIP authority simply by changing its interpretation of some provision in section 7410(a)(2) and declaring the previously approved SIP "deficient." No principle of deference to agencies can allow a statute to be interpreted in such an atexutal and self-aggrandizing manner.

EPA's interpretation of "correct the deficiency" also circumvents the SIP-call process of section 7410(k)(5). Later-discovered deficiencies in a SIP are supposed to trigger a finding of "inadequa[cy]" under section 7410(k)(5), which requires EPA to notify the State of the inadequacies and provide an opportunity to submit a revised SIP within a "reasonable deadline." On EPA's view, however, any "inadequacy" in a previously approved SIP can be deemed a "deficiency" in the original submission, which allows EPA to impose a FIP immediately without using the procedural protections required by section 7410(k)(5). That is not a plausible interpretation of the statute.

3. EPA Has Failed To Show That The Transport Rule FIPs Are Severable.

Because EPA's FIP authority for the 1997 standards expired when it approved the good-neighbor SIPs submitted by 22 States, the Transport Rule should be vacated to the extent it imposes FIPs on States with EPA-approved good-neighbor SIPs for the 1997 standards. The Court should go further, however, and vacate the entire rule, because the FIPs it imposes are non-severable. *See supra* p. 23.

EPA suggests in a footnote that this Court can salvage the Transport Rule even if EPA lacks authority to impose FIPs to implement the 1997 standards on the States with EPA-approved SIPs for those standards. *See* EPA Br. 33 n.11. EPA claims that "for all States except South Carolina and Texas, the EPA's authority to promulgate the federal plan

for the annual NO_x and SO_2 requirements flows from the EPA's finding of failure to submit or disapproval of a proposed state plan for the 2006 $PM_{2.5}$ standard, which CAIR did not address." *Id.* This footnote seems to be saying that the Court should vacate only the FIPs that were imposed on South Carolina and Texas, leaving the remaining Transport Rule FIPs in place.

EPA is wrong to claim that it can impose the Transport Rule FIPs on any State for which it previously issued a SIP disapproval or finding of failure to submit regarding the 2006 $PM_{2.5}$ standard. The Transport Rule FIPs implement three different NAAQS: the 1997 standard for 8-hour ozone, the 1997 standard for annual $PM_{2.5}$, and the 2006 standard for daily $PM_{2.5}$. 76 Fed. Reg. at 48,219 n.12 (Pet. App. 171a–72a n.12). EPA appears to believe that if section 7410(c)(1) authorizes it to impose a FIP for a particular NAAQS on a particular State, then EPA may impose one or more additional FIPs on that State to implement any other NAAQS that EPA has ever issued. That is not a defensible construction of section 7410(c)(1), and EPA makes no effort to defend it.

In any event, even assuming EPA is correct to say that this Court need only vacate the Transport Rule FIPs imposed on South Carolina and Texas, EPA never explains how this Court can vacate the FIPs that govern those two States without causing the entire Transport Rule FIP network to come apart. EPA asserts that "the effect on the Transport Rule

would be slight," but it never explains how the remaining Transport Rule FIPs can survive when the good-neighbor obligations imposed on other States can no longer presume compliance on the part of South Carolina and Texas.

B. 42 U.S.C. § 7410(c)(1) Limits The Type Of FIP That EPA May Impose After Disapproving A SIP Submission Or Finding That A State Has Failed To Make A Required SIP Submission.

There is a broader problem with the Transport Rule's good-neighbor FIPs: EPA issued these FIPs without ever telling the States *how much* contribution to another State's air pollution would be deemed "significant" under section 7410(a)(2)(D)(i)(I). Instead, EPA chose to leave the States in the dark about their good-neighbor obligations while demanding that the States submit SIPs to implement section 7410(a)(2)(D)(i)(I) unglossed by any agency interpretation. Not until it announced and imposed the Transport Rule FIPs did EPA deign to inform the States what it means to "contribute significantly" to another State's air pollution. The Clean Air Act does not permit EPA to play hide-the-ball in this manner.

The good-neighbor provision states that a SIP must prohibit emissions that "contribute *significantly*" to another State's nonattainment of any EPA-announced air-quality standard. 42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added). This statute contains a significant gap: Just how much cross-

state pollution is needed to contribute *significantly* to another State's nonattainment of EPA's air-quality standards? *See* EPA Br. 34, 45, 55 (noting the ambiguity in the good-neighbor provision); ALA Br. 12, 25, 28, 35 (same); Calpine Br. 27–31, 33 (same).

Statutes containing gaps of this sort are presumed to delegate gap-filling authority to the agency that administers the statute. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 843–44 (1984). But no State can know how to comply with section 7410(a)(2)(D)(i)(I) until EPA fills in the blanks and announces its formula for determining "significan[ce]." Otherwise, the States are left to guess how much pollution will be deemed "significant[]" by EPA—or whether they even need to take steps to mitigate their contributions to other States' air pollution. Submitting a good-neighbor SIP under these circumstances is a fool's errand. EPA will judge the SIP submission according to a standard-to-be-announced-later and then impose FIPs on the States for "noncompliance" with this unknown (and unknowable) legal standard.

Delaware's experience illustrates the problems that arise with an undefined and unquantified good-neighbor provision. Delaware submitted a good-neighbor SIP to EPA months before EPA issued the final Transport Rule. EPA responded that Delaware's SIP submission would be approved if Delaware were ultimately excluded from the Transport Rule program, and that the exact same SIP would be disapproved (and a Transport Rule FIP

imposed) if Delaware were ultimately included in the program. 76 Fed. Reg. 2,853, 2,856–58 (Jan. 18, 2011); *see also* 76 Fed. Reg. at 48,212–14 (Pet. App. 142a–44a); 75 Fed. Reg. at 45,215 (reflecting that EPA proposed to include Connecticut, Delaware, Massachusetts, Oklahoma, and the District of Columbia in the final Transport Rule, even though none was ultimately included, and that EPA proposed to exclude Texas from the final rule's annual $PM_{2.5}$ program, even though Texas was ultimately included in that program). Not even *EPA* could determine the States' good-neighbor obligations before the Transport Rule quantified the States' interdependent responsibilities under section 7410(a)(2)(D)(i)(I).

The petitioners say that this regime is exactly what the text of the Clean Air Act allows. *See* EPA Br. 24–33; ALA Br. 53–56, 62–65; *see also* NY Br. 24–27. Once EPA announces a NAAQS, it triggers a three-year deadline for the States to submit SIPs, 42 U.S.C. § 7410(a)(1), and those SIPs must implement all of the requirements of section 7410(a)(2)—including the requirements of the good-neighbor provision. In the petitioners' view, EPA can announce a NAAQS, require the States to submit good-neighbor SIPs that can only guess at how EPA will determine their responsibilities under section 7410(a)(2)(D)(i)(I), and then impose FIPs to implement the agency's never-before-announced interpretation of that statutory provision. If the States are unable to divine how EPA will quantify

their good-neighbor obligations when submitting their SIPs, that's their problem.

The petitioners' argument overstates the scope of EPA's FIP authority under section 7410(c)(1). Consider the text of that provision:

> The Administrator shall promulgate *a Federal implementation plan* at any time within 2 years after the Administrator—
>
> > **(A)** finds that a State has failed to make a required [SIP] submission . . . . or
> >
> > **(B)** disapproves a [SIP] submission in whole or in part,
>
> unless the State corrects the deficiency, and the Administrator approves the plan or plan revision, before the Administrator promulgates such Federal implementation plan.

42 U.S.C. § 7410(c)(1) (emphasis added). The petitioners seem to think that section 7410(c)(1) authorizes EPA to impose *any* federal implementation plan once it issues findings of failure or disapprovals. *See* EPA Br. 25. That is not a sensible or permissible construction of the statute. When section 7410(c)(1) authorizes EPA to impose "a federal implementation plan," EPA's FIP authority is

limited to implementing the State's SIP obligations at the time of the SIP disapproval or the finding of failure to submit.

Surely there must be *some* limitations on the FIP authority conferred by section 7410(c)(1). *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 388 (1999). Suppose that EPA disapproved a State's SIP submission regarding the 2006 24-hour $PM_{2.5}$ standard and then decided to impose a FIP that implements not only that standard but also an entirely different NAAQS that EPA had promulgated earlier that day. Could EPA defend the legality of this FIP by simply pointing to its earlier disapproval of the State's SIP submission? Of course not. Although section 7410(c)(1) would both authorize and require EPA to impose "*a* federal implementation plan" in these circumstances, the statute does not open the door for EPA to impose any FIP that suits its fancy. There must be some connection between the contents of the FIP and the State's SIP obligations under 42 U.S.C. § 7410(a)(1)–(2).

Once it is acknowledged that EPA's FIP authority under section 7410(c)(1) is limited, it falls to this Court to resolve the extent of those limitations—and to decide whether EPA transgressed those boundaries by imposing FIPs to implement a never-before-announced interpretation of the States' good-neighbor obligations. The petitioners do not engage this question in their briefs, dogmatically insisting that the "plain language" of section 7410(c)(1)

authorizes the Transport Rule FIPs simply because those FIPs were preceded by a disapproval of a SIP submission or a finding of failure to submit. EPA Br. 25; ALA Br. 26; *see also* NY Br. 2, 35. But unless the petitioners want to contend that section 7410(c)(1) allows the Transport Rule to impose any FIP that EPA wants, they will need to rely on something more than incantations of "plain language" and *Chevron* deference.

1. EPA's FIP Authority Under 42 U.S.C. § 7410(c)(1) Is Limited.

The petitioners never come out and say that EPA may impose any FIP that it pleases once it disapproves a State's SIP submission or issues a finding of failure to submit. But neither do they acknowledge any judicially enforceable limits on the contents of a FIP once EPA makes disapprovals or findings under section 7410(c)(1)(A)–(B). *See* EPA Br. 16, 24–33; *see also* NY Br. 5, 16–17, 21–22. New York suggests that a FIP imposed under section 7410(c)(1) must "timely achieve the NAAQS," but it never says whether the Clean Air Act limits the means by which EPA may achieve that goal. NY Br. 21–22. And although EPA and New York both contend that States can calculate their good-neighbor obligations on their own, they do not concede that EPA's FIP authority is limited to enforcing legal obligations that the States can determine without exposition from EPA. *See* EPA Br. 16, 24–33; NY Br. 5, 16–17, 21–22.

If the petitioners believe that EPA's FIP authority under section 7410(c)(1) is unlimited, they should say so. Otherwise, they should explain what the limits on EPA's FIP authority are and why the Transport Rule FIPs fall on the permissible side of the line. The petitioners' reliance on deference to agencies suggests that they believe that EPA, rather than the courts, should determine the limits of the FIP authority conferred by section 7410(c)(1). *See* EPA Br. 30–32. But it is not clear from their briefs whether the petitioners intend to push the concept of deference this far, and the petitioners do not explain how far this deference (if any) to EPA's invocation of its FIP authority should extend.

In all events, it cannot be the case that an EPA-imposed FIP is *per se* legal—regardless of its contents—so long as it is preceded by a SIP disapproval or finding of failure to submit. Imagine a FIP that imposes requirements that have nothing to do with the Clean Air Act or the NAAQS that triggered the three-year SIP clock under section 7410(a)(1). That could not possibly be defended as a lawful "federal implementation plan" under section 7410(c)(1). We assume that the petitioners will concede at least this much—that there are judicially enforceable limits on the contents of a FIP, even when EPA has issued the disapproval or finding required by section 7410(c)(1)(A)–(B). The next step is to determine what those limits are, as well as the statutory sources of those limits.

2. EPA's FIP Authority Under 42 U.S.C. § 7410(c)(1) Cannot Exceed A State's Known SIP Obligations.

Consider again the hypothetical just mentioned. Suppose that the Transport Rule FIPs attempted to implement not only the 1997 and 2006 standards for ozone and $PM_{2.5}$, but also an entirely new NAAQS that EPA had announced for the first time in the Transport Rule itself. One would think that this exceeds the scope of the FIP authority conferred by section 7410(c)(1). But why? What exactly in the statute prohibits EPA from doing that?

All that section 7410(c)(1) says is that EPA "shall promulgate a federal implementation plan" after it issues a disapproval or finding described in section 7410(c)(1)(A)–(B)—without purporting to define or limit the contents of the "federal implementation plan" that EPA is required to impose. And although the term "federal implementation plan" is defined elsewhere in the Clean Air Act, that definition does not establish an outer boundary on the contents of a FIP, providing only the minimum requirements for what a "federal implementation plan" must contain:

> The term "Federal implementation plan" means a plan (or portion thereof) promulgated by the Administrator to fill all or a portion of a gap or otherwise correct all or a portion of an inadequacy in a State implementation plan, and which includes enforceable emission limitations or other control measures,

> means or techniques (including economic incentives, such as marketable permits or auctions of emissions allowances), and provides for attainment of the relevant national ambient air quality standard.

42 U.S.C. § 7602(y). But this should not lead to the conclusion that the Clean Air Act imposes no boundaries whatsoever on the contents of a FIP.

First, the text of section 7410(c)(1) indicates not only that EPA's FIP authority is limited, but also that it is limited to implementing the States' existing SIP obligations. The "unless" clause provides that EPA's FIP authority expires once the State "corrects the deficiency" that led to the disapproval or finding of failure to submit and EPA approves a SIP reflecting those corrections. If EPA's FIP authority could extend beyond "the deficiency" in the State's SIP, then it would make no sense for section 7410(c)(1) to revoke that authority once "the deficiency" has been corrected. EPA's FIP authority must therefore be limited to correcting "the deficiency" in the State's SIP.

"[T]he deficiency" addressed by an EPA-imposed FIP must also be a "deficiency" that existed—and that could have been corrected by the State—at the time EPA issued its disapproval or finding under section 7410(c)(1)(A)–(B). Otherwise, the State has no opportunity to correct the alleged deficiency, and the "unless" clause becomes a meaningless gesture.

Suppose that EPA were to promulgate a NAAQS at time one, disapprove a State's SIP submission for that NAAQS at time two, and then quantify the State's good-neighbor obligations at time three. If one tried to contend that the SIP's "deficiency" should extend to its failures to comply with EPA's later-announced good-neighbor obligations, that "deficiency" would not be one that the State was capable of correcting at the time it learned of the SIP disapproval. It is not reasonable for EPA to say that it may use its FIP authority to impose requirements that were promulgated or announced *after* it issued findings or disapprovals under section 7410(c)(1)(A)–(B).

Nothing in the petitioners' briefs contests the notion that EPA's FIP authority is limited to correcting "the deficiency" that triggered EPA's finding or disapproval, or that the FIP-corrected "deficiency" must be one that the State could have corrected as soon as it learned of the SIP disapproval or finding of failure to submit. *See* Part II.B.1, *supra*. Instead, the petitioners insist that the States *could* have corrected the deficiency in their good-neighbor SIPs—even as EPA refused to quantify "significan[ce]" in section 7410(a)(2)(D)(i)(I). It is to that issue that we now turn.

3. EPA Cannot Use Its FIP Authority To Impose Good-Neighbor Obligations That Were Not Announced At The Time Of The SIP Disapproval Or Finding Of Failure To Submit.

The petitioners suggest that the States can figure out their good-neighbor obligations on their own, without any need for EPA to say what counts as a significant contribution to another State's air pollution. *See* EPA Br. 29–30; *see also* NY Br. 24–27; 29–35. If this were true, then there would be no basis for the States to object to the Transport Rule FIPs because the FIPs would be addressing a deficiency that the States could have corrected.

But the petitioners actually advance a more limited claim. They contend only that the States can determine the *empirical* questions surrounding their contributions to interstate air pollution. *See, e.g.*, EPA Br. 29 ("States routinely undertake technically complex air quality determinations. . . . [T]he necessary emissions information from all States is publicly available."); ALA Br. 53–54 (noting that the States can undertake a "technical analysis" of interstate air pollution); *see also* NY Br. 31 ("States will have the capacity to monitor and model emissions and air quality.").

The petitioners do not and cannot possibly claim that the States can predict how EPA will interpret section 7410(a)(2)(D)(i)(I) before EPA announces its authoritative construction of that statute. Section 7410(a)(2)(D)(i)(I) delegates to EPA the prerogative

to decide *how much* pollution will be deemed to "contribute significantly" to another State's nonattainment. Until EPA answers that question, the States are shooting at an invisible target. All the scientific knowledge in the world is useless if the States are left to guess the way in which EPA might ultimately quantify "significan[ce]" for States included in a final regional rule under section 7410(a)(2)(D)(i)(I).

States have no way to ensure that their calculations of required reductions match EPA's because EPA's analysis ultimately turns on subjective policy judgments regarding cost-effectiveness. *See* 76 Fed. Reg. at 48,248–49 (Pet. App. 316a–23a); Pet. App. 15a–18a. In defining the required reductions in the Transport Rule, EPA developed "cost curves," or estimates of the amounts of reductions available at certain cost thresholds. 76 Fed. Reg. at 48,248 (Pet. App. 319a–20a). It then estimated the effect, at different cost-per-ton levels on its cost curves, that the contributing States' "combined reductions" would have on downwind air quality and identified "significant cost thresholds," or "point[s] along the cost curves where a noticeable change occurred in downwind air quality." *Id.* at 48,249 (Pet. App. 322a). So to accurately determine their reduction obligations, the covered States would have had to guess not only what EPA's cost curves would look like, but also what changes on those curves would be most "noticeable" to EPA.

The complexity of the linkages between emissions from an upwind State and nonattainment in downwind States that the petitioners mention only further decreases the likelihood of matching EPA's analysis. *See, e.g.*, EPA Br. 6. And because downwind States are also required to control their own emissions, and may voluntarily choose to impose stricter controls than EPA requires, upwind States would also have to make accurate guesses about what controls those downwind States would implement.[13]

New York's brief eventually gets around to acknowledging this point. NY Br. 33 ("To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution."); *see also* ALA Br. 53 (recognizing that "a State's assessment of its contribution might diverge from subsequent federal findings"). But given this concession, we are at a loss to understand how New York can simultaneously insist that the States can determine their good-neighbor obligations before EPA completes that work. *See* NY Br. 29 ("States Can And Do Independently Determine Their

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[13] Just as some States may choose to impose emissions-reduction obligations beyond those that EPA requires, others choose to impose no greater burdens on their sources than those EPA deems necessary. States that have made the latter policy decision can control in-state sources in the first instance only after they know the overall reductions EPA will require.

Good-Neighbor Obligations."). As New York recognizes, the formula that the Transport Rule deploys for determining significant contribution under the good-neighbor provision is quite complex. *See id.* at 13; *see also* ALA Br. 18–20. Surely New York does not believe that the States could have figured out this formula through divination. But New York never explains how else the States are supposed to know whether and to what extent they must reduce their contributions to interstate air pollution.

The petitioners also suggest that section 7410(a)(2)(D)(i)(I) delegates interpretive authority to the States—at least until EPA acts to quantify the States' good-neighbor obligations. *See* EPA Br. 24–25; *see also* NY Br. 30 ("Section [74]10(a)(2), which includes the good-neighbor provision, charges the *States* with responsibility for implementing SIP requirements in the first instance . . . . The Act thus obligates state authorities to interpret and apply the statute's terms in the first instance—not to helplessly await EPA's interpretation.") (emphasis added). This argument runs headlong into *Chevron*, which established that statutory ambiguities are presumed to delegate gap-filling authority to the federal agency that administers the statute. 467 U.S. at 843–44. The States cannot decide the legal meaning of "significant[]" contribution unless EPA chooses to give them that authority. *See* 63 Fed. Reg. at 57,369. And EPA has given the States no such authority here.

The petitioners' argument also contradicts EPA's longstanding interpretation of section 7410(a)(2)(D)(i)(I). In the 1998 NO_x SIP Call, for example, EPA asserted that it held the sole prerogative to resolve the ambiguities in that provision—and that the States had no role to play in deciding what the statute means. *See* 63 Fed. Reg. at 57,368–70.

Now EPA seems to be saying that the States are to take the first crack at quantifying significance under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24–25 ("Nothing in the statute requires the EPA to quantify upwind States' significant contribution obligations at all . . . . To the contrary, the States' obligation to submit timely state plans with all required elements, including good neighbor provisions, is imposed directly by [section 7410(a)(2)(D)(i)(I)] itself."). But EPA cannot abandon its claim to exclusive interpretive authority over section 7410(a)(2)(D)(i)(I) unless it provides a reasoned explanation for the change of heart. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books."). No such explanation appears in the Transport Rule.

So it is no answer for the petitioners to say that the States can determine their good-neighbor obligations on their own. The States cannot predict how EPA will quantify significance in section 7410(a)(2)(D)(i)(I), and the States lack gap-filling authority over the statute under *Chevron* as well as

under EPA's past interpretation of the statute. The only way that the petitioners can maintain their case is to claim that section 7410 allows EPA to leave the States in the dark: Announce a NAAQS, require the States to submit SIPs that must guess at how EPA will quantify their good-neighbor obligations, and then impose FIPs after the States either guess wrong or decide that this shell game is not worth playing.

But that is not a permissible construction of section 7410. Until EPA exercises its delegated authority to determine *how much* contribution to interstate air pollution is "significant[]" within the meaning of section 7410(a)(2)(D)(i)(I), the States have no obligation to implement EPA's standard-to-be-announced-in-the-future—just as the States have no obligation to implement a NAAQS until EPA invokes its delegated authority and announces the standard.

The petitioners note the absence of specific statutory language requiring EPA to announce a formula for determining thresholds for "significan[ce]" and 'interfere[nce]" under section 7410(a)(2)(D)(i)(I). *See* EPA Br. 24–26; NY Br. 24–27. But this observation gets them nowhere. Under *Chevron*, statutes are *presumed* to delegate gap-filling authority to the agency that administers the statute—regardless of whether the statute contains explicit language conferring that responsibility on the agency. And until EPA acts to fill the gaps in section 7410(a)(2)(D)(i)(I), the unglossed statute provides no guidance to States attempting to comply

with their good-neighbor obligations. Imposing a FIP to implement a previously unannounced good-neighbor obligation is no different from imposing a FIP to implement a previously unannounced NAAQS. In both situations, the agency that holds delegated gap-filling authority concealed its plans until after it was too late for the States to submit SIPs in the hope of staving off EPA-imposed FIPs.[14]

C. EPA's Understanding Of Its FIP Authority Subverts The Regime Of Cooperative Federalism Established In The Clean Air Act.

EPA's interpretation of its FIP authority is problematic for an additional reason: it empowers

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[14] EPA's brief attacks the court of appeals for analogizing the issuance of a NAAQS with the quantification of the States' good-neighbor obligations. *See* EPA Br. 31 n.10. But the analogy is EPA's own. In the NO_x SIP Call, the agency explained:

> Determining the overall level of air pollutants allowed to be emitted in a State [included in a section-7410(a)(2)(D)(i)(I) regional program] is comparable to determining overall standards of air quality [*i.e.*, NAAQS], which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

63 Fed. Reg. at 57,369; *see also id.* at 57,370 (finding it "necessary" for EPA "to establish the [States'] overall emissions levels" under section 7410(a)(2)(D)(i)(I)).

the agency to undermine statutory prerogatives that the Clean Air Act preserves for the States.

The Clean Air Act ensures States an opportunity to avoid an EPA-imposed FIP by submitting a SIP that complies with the requirements of section 7410(a)(2). *See* 42 U.S.C. § 7410(a)(1) (providing that States have three years, "or such shorter period as the Administrator may prescribe," to submit a SIP after EPA issues a NAAQS). The Transport Rule rendered this opportunity meaningless because EPA left the States unaware of how it would interpret the phrase "contribute significantly" until the moment it promulgated the Transport Rule FIPs. If EPA wants to promulgate a good-neighbor FIP based on a novel and previously unannounced construction of section 7410(a)(2)(D)(i)(I), it must first quantify the States' good-neighbor obligations and provide the States a reasonable time period in which to submit SIPs. Anything less would make the States' SIP-submission opportunity a matter of EPA whim rather than statutory entitlement.

EPA nevertheless insists that the Transport Rule FIPs are lawful because they were preceded by a SIP disapproval or finding of failure to submit, and (according to EPA) section 7410(c)(1) requires nothing more. But it is not enough under *Chevron* for an agency to show that its interpretation of a statute is linguistically possible. *See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994); *see also Whitman*, 531 U.S. at 468–71; *FDA v. Brown & Williamson Tobacco Corp.*, 529

U.S. 120, 132 (2000). It must also be reasonable, and it is not reasonable to interpret the Clean Air Act in a manner that leaves the States' opportunity to avoid a FIP through the SIP-submission process entirely at the mercy of EPA.

Suppose that EPA announced a NAAQS but gave the States only two hours in which to submit SIPs. Section 7410(a)(1) establishes a default rule of three years for the States to submit SIPs after EPA issues a NAAQS, but provides that EPA "may prescribe" a "shorter period." EPA might try to defend this two-hour window as consistent with the literal language of section 7410(a)(1); two hours is indeed a "shorter period" than three years. But it would not be reasonable for EPA to establish a "shorter period" that deprives the States of any meaningful opportunity to stave off FIPs with their SIP submissions.

The same problem plagues the Transport Rule. By imposing FIPs on the same day that EPA quantified the States' good-neighbor obligations, EPA left the States without any genuine opportunity to avoid the Transport Rule FIPs by submitting SIPs. Even though years had elapsed between the time that EPA announced the relevant NAAQS and the time of the Transport Rule, the States could not determine their good-neighbor obligations because no State had any idea how EPA would interpret the phrase "contribute significantly." Indeed, the States did not know whether they would need to undertake any pollution-abatement efforts under EPA's not-

then-announced construction of section 7410(a)(2)(D)(i)(I).

EPA's approach is all the more unreasonable when one considers how state authority is preserved throughout the Clean Air Act. Many more provisions of the Act confirm the States' ability to:

- provide input on the classifications and obligations that EPA defines, *e.g.*, 42 U.S.C. §§ 7407(d)(1)(B)(ii) (area designations), 7411(f)(3) (new emissions sources);
- have a fair chance to satisfy EPA's obligations without federal interference, *e.g.*, *id.* §§ 7412(*l*)(1), (5) (programs addressing hazardous air pollutants); 7511a(g)(2)–(3), (5) (milestones for nonattainment areas); 7545(m) (standards for oxygenated fuel); and
- play the lead role in enforcement and implementation, *e.g.*, *id.* §§ 7411(c)(1) (performance standards for new sources), 7511b(e)(7) (controls targeting volatile organic compounds); *see also id.* § 7411(j)(1)(A) (conditioning EPA's power to grant a waiver to a new emissions source on "the consent of the Governor of the State in which the source is to be located").

Again and again, the Act allows EPA to step in only if the States choose not to regulate or their initial regulatory efforts fail. *E.g.*, *id.* §§ 7589(c)(2)(F) (authorizing EPA to establish an adequate clean-fuel program only if California does

not), 7651e(b) (authorizing EPA to allocate certain emissions allowances only if States do not). And when a state plan or program fails to meet the obligations EPA defines, the Act often gives the State a chance to fix the deficiency through revisions that will obviate the need for federal involvement. *E.g.*, *id.* §§ 7412(*l*)(5) (programs addressing hazardous air pollutants), 7424(b) (plans for major fuel-burning sources), 7661a(d)(1) (permit programs).

Outside of this litigation, EPA has repeatedly recognized the need to give States a reasonable opportunity to implement new obligations through SIPs after a final rule establishes a regional program under the good-neighbor provision. EPA explained in CAIR, for instance, that

> [w]here . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States . . . . may not be available, . . . [a State's] section [74]10(a)(2)(D) SIP submission should indicate that the necessary information is not available at the time the submission is made or that, based on the information available, the State believes that no significant contribution to downwind nonattainment exists.

70 Fed. Reg. at 25,263; *accord* JA 195 (2006 EPA guidance document); 77 Fed. Reg. at 46,363 & n.7 (EPA's confirmation a year *after* the Transport Rule was promulgated that section 7410(a)(2)(D)(i)

"contains numerous terms that require substantial rulemaking by EPA in order to determine such basic points as what constitutes significant contribution").

And in CAIR, after acknowledging the limited requirements of SIPs submitted before EPA quantifies good-neighbor obligations for purposes of a new regional rule, EPA identified section 7410(k)(5) as the proper mechanism to address any new obligations: "EPA can always act at a later time after the initial section [74]10(a)(2)(D) submissions to issue a SIP call under section [74]10(k)(5) to States to revise their SIPs to provide for additional emission controls to satisfy the section [74]10(a)(2)(D) obligations if such action were warranted based upon subsequently-available data and analyses." 70 Fed. Reg. at 25,263–64. The idea that EPA could unilaterally impose a FIP without affording the States a reasonable time for SIP submissions was not even considered as an option.

Indeed, EPA recognized in both the NO_x SIP Call and CAIR that States should have the first opportunity to implement EPA-announced good-neighbor obligations. *See id.* at 25,167, 25,176; 63 Fed. Reg. at 57,451. The Transport Rule departed from those precedents without acknowledging them or explaining why it was not following them. *See Fox Television Stations*, 556 U.S. at 515. EPA now tries to suggest that it switched to a FIP-first regime to secure environmental benefits, but that explanation falls flat. EPA had CAIR in place for years before it issued the Transport Rule, and EPA's own data show

that CAIR was achieving widespread downwind attainment. *See* 2011 Progress Report at 12, 14.

D. The Petitioners' Remaining Arguments Are Without Merit.

The petitioners and their supporters express concern that vacating the Transport Rule FIPs will cause EPA to violate the Clean Air Act in at least two respects. First, New York suggests that a ruling to this effect will leave EPA unable to impose FIPs when section 7410(c)(1) requires them. NY Br. 22. Second, the petitioners claim that it will cause EPA to violate the Clean Air Act by tolerating nonattainment in downwind States. *See* EPA Br. 27–28; *see also* NY Br. 27–29. Each of these concerns is chimerical.

The petitioners are correct to note that section 7410(c)(1) requires EPA to issue FIPs within two years after disapproving a State's SIP submission or finding that the State has failed to make a required submission. But the state and local respondents are not disputing EPA's authority (or statutory duty) to impose FIPs; they are challenging only the *contents* of the FIPs imposed by EPA's Transport Rule. EPA could, for example, have imposed good-neighbor FIPs based on CAIR, which the D.C. Circuit allowed to remain in place until EPA issued a valid replacement. *See North Carolina*, 550 F.3d at 1178. This approach would have fulfilled the statutory mandate of section 7410(c)(1), but without using the FIP process to impose good-neighbor obligations that were unknown to the States at the time EPA issued

its predicate findings or disapprovals. Then EPA could have announced its new interpretation of the States' good-neighbor obligations and allowed the States a reasonable time to submit SIPs to implement those requirements, using the CAIR FIPs as an interim measure as the process unfolded.

The petitioners are also wrong to suggest that vacating the Transport Rule FIPs will leave EPA powerless to protect downwind States from interstate air pollution. EPA remains able to impose CAIR FIPs on States that have failed to submit good-neighbor SIPs for the 1997 standards, and the States with EPA-approved CAIR SIPs already have plans in place to mitigate interstate transport of ozone and $PM_{2.5}$. Those SIPs have resulted in widespread attainment of the ozone and $PM_{2.5}$ standards at issue here. *See* Industry & Labor Respondents' Br. Part I.A.3. CAIR FIPs might not provide immediate attainment of every NAAQS in every region of the country, but they would go a long way toward that goal while EPA undertakes the post-*North Carolina* tasks of quantifying new good-neighbor obligations, allowing the States a reasonable window of time to submit SIPs or SIP revisions, and deciding whether to approve the SIP submissions or impose FIPs instead.

Finally, if any downwind States find themselves in noncompliance with the relevant NAAQS, that is the fault of EPA. EPA waited nearly eight years after announcing its 1997 standards for 8-hour ozone and $PM_{2.5}$ before issuing findings of failure to submit

for the States that had failed to implement good-neighbor SIPs with respect to those standards. Then EPA promulgated CAIR, which was rejected as unlawful by the D.C. Circuit, forcing EPA back to the drawing board. EPA's delays and mistakes should not excuse its decision to impose FIPs immediately and deprive upwind States of the opportunity to avoid those FIPs by submitting SIPs. In short, EPA cannot benefit from an exigency of its own creation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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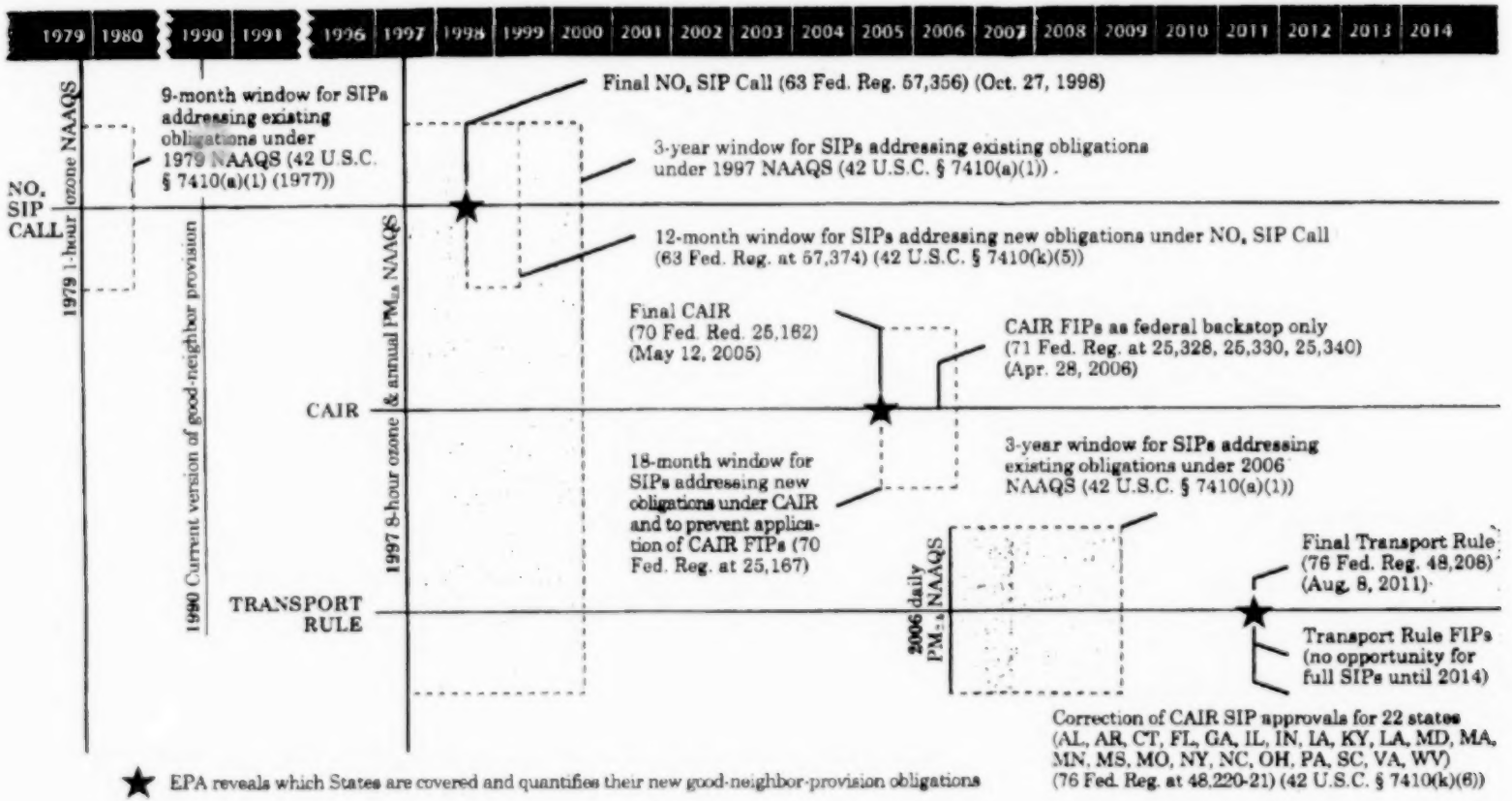
Appendix

SIP Opportunities Under the NO_x SIP Call, CAIR, and the Transport Rule



RESPONDENT'S BRIEF

RECORD AND BRIEFS

Nos. 12-1182, 12-1183

Supreme Court, U.S.
APR 18 2013
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT STATES AND CITIES IN SUPPORT OF PETITIONERS

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INTRODUCTION

The States of New York, Connecticut, Delaware, Illinois, Maryland, Massachusetts, North Carolina, Rhode Island, and Vermont, the District of Columbia, and the Cities of Bridgeport, Chicago, New York, and Philadelphia, and the Mayor and City Council of Baltimore ("States and Cities"), all intervenor-respondents supporting the validity of the Transport Rule in the court of appeals, respectfully submit this brief in support of the petitions for a writ of certiorari filed by the Environmental Protection Agency (EPA Petition, No. 12-1182), and the American Lung Association, *et al.* (ALA Petition, No. 12-1183).

Respondent States and Cities support the grant of certiorari on each of the questions presented in the petitions, but focus in this brief on the second question presented in the EPA Petition (corresponding to the third question presented in the ALA Petition): where the Clean Air Act's "good neighbor" provision requires States to adopt state implementation plans (SIPs) that prohibit emissions that "contribute significantly" to air pollution problems in other States, *see* 42 U.S.C. § 7410(a)(2)(D)(i)(I), are States excused from compliance until the EPA has adopted a rule quantifying each State's interstate pollution obligations?

This question is of overriding importance to the States and Cities. Downwind States and Cities have imposed stringent and expensive emissions-reduction requirements in an effort to prevent the thousands of premature deaths and billions of dollars in increased health-care costs associated with air pollution and yet are still unable to meet and maintain compliance with

national air-quality standards that EPA has determined are necessary to protect public health. Effective interstate pollution controls are therefore crucial to the efforts of many downwind areas to achieve safe air quality.

The Clean Air Act's "good neighbor" provision was designed to make States jointly responsible for addressing air-quality problems regardless of whether the problems are caused by in-state or out-of-state sources. And real-world experience confirms Congress's judgment that States can model and determine their contribution to interstate air pollution to comply with their good-neighbor obligations. By exempting States from the independent, immediately enforceable good-neighbor obligations that the plain text of the Act imposes, the court of appeals excised a key compliance tool from the Act. If not corrected, the decision will deny downwind States and Cities the protection Congress intended to provide and fatally frustrate the Act's requirement of timely attainment of air-quality standards.

STATEMENT

1. This case concerns the decades-long struggle to address and remedy the harms of interstate air pollution. More than a century ago, in *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), this Court recognized that the harms of air pollution are not limited to local effects. Pollution originating in one State can cause serious damage to the environment and public health in neighboring States. From the inception of the modern Clean Air Act in 1970, Congress has sought to address the problem of interstate air pollution and has strengthened States' obligations over time. EPA Pet. at 2-4. The applicable

section is known as the "good neighbor" provision because it has the aim of making States responsible for in-state emissions that cause out-of-state harm.

The current version of the good-neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), operates within the Clean Air Act's cooperative federalism model to require States to address their contributions to air pollution in out-of-state areas. Under the Act, EPA sets health-based national ambient air quality standards (NAAQS) for particular air pollutants and must also identify areas that meet and fail to meet each NAAQS. *Id.* § 7407(c), (d). States, however, retain the primary responsibility to regulate air pollution to achieve the NAAQS by adopting state implementation plans (SIPs) that contain appropriate emissions control measures. *Id.* § 7410(a).

2. Because the goal of the Clean Air Act is timely compliance with air-quality standards necessary to protect public health and welfare, the Act imposes a series of interlocking deadlines:

- To ensure that the NAAQS serve their intended protective function, EPA has a continuing obligation to review each NAAQS every five years and to revise the NAAQS if necessary to meet statutory requirements. *Id.* § 7409(d)(1).

- States must submit SIPs for EPA approval within three years of EPA's promulgation of a new or revised NAAQS. *Id.* § 7410(a)(1).

- States also face stringent deadlines for attaining full NAAQS compliance (generally no later than five

years from promulgation of NAAQS, except for the ozone NAAQS, where deadlines vary between three and twenty years). *Id.* §§ 7502(a)(2), 7511(a), (b).

If States fail to achieve timely NAAQS compliance, they face significant statutory penalties. *Id.* § 7509(b). Likewise, if EPA finds that a State has failed to submit a timely SIP after promulgation of a NAAQS, it must issue a federal implementation plan (FIP) for the State. *Id.* § 7410(c).

3. The purpose of the good-neighbor provision is "to equalize the positions of the States with respect to interstate pollution by making a source at least as responsible for polluting another State as it would be for polluting its own State." S. Rep. No. 95-127, at 42 (1977). Based on experience in implementing the Act, Congress found that upwind States would have little incentive to control emissions whose harm was felt elsewhere unless the Act effectively mandated that upwind States act as good neighbors and remedy the out-of-state harms of their in-state emissions. This equitable concern has both a public health and an economic component, as States unable to attain healthy air must not only respond to harm to their residents but also enact increasingly expensive controls on in-state sources in an attempt to compensate for poorly controlled upwind emission sources.

Thus, the Act's good-neighbor provision is part and parcel of States' SIP obligations. Just as the Act requires States to submit SIPs that will assure NAAQS attainment for in-state regions, 42 U.S.C. § 7410(a)(1), the good-neighbor provision imposes the parallel obligation on States to submit SIPs that prohibit and control in-state emissions that "contribute significantly to nonattainment"

of a NAAQS in "any other State" or that "interfere with [NAAQS] maintenance by[] any other State." *Id.* § 7410(a)(2)(D)(i)(I).

Good-neighbor controls are also necessary to the Act's goal of prompt NAAQS compliance. Interstate pollution remains a serious public health problem. Many downwind States and localities have by now imposed substantial emissions controls—in some cases, controls more stringent than required under federal law. But downwind States and cities cannot reduce or eliminate emissions from upwind States that harm air quality in downwind areas. Unchecked pollution from upwind States continues to account for more than three-quarters of local air pollution concentrations in many areas struggling to attain or maintain NAAQS compliance. *See* ALA Pet. at 6.

4. EPA has issued several regulations to assist States in meeting their good-neighbor obligations under the Clean Air Act—each subject to extensive litigation. In 2008, the court of appeals found fundamental flaws in the Clean Air Interstate Rule (CAIR), the predecessor to the rule at issue in this litigation. Among other flaws, the court noted that EPA had failed to align CAIR's requirements for upwind States' good-neighbor emissions reductions with downwind States' statutory deadlines to comply with the NAAQS for ozone and fine particulate matter. *North Carolina v. EPA*, 531 F.3d 896, 911-12 (D.C. Cir. 2008) (per curiam). Recognizing that even the legally insufficient emissions reductions provided by CAIR were important to downwind States, the court left CAIR in effect pending remand to EPA to develop a new rule that met the court's objections. *North Carolina v. EPA*, 550 F.3d 1176 (2008) (per curiam).

5. In 2011, EPA promulgated the Transport Rule in response to the remand in *North Carolina*. The rule covers the 1997 ozone and annual fine-particulate matter NAAQS addressed in CAIR as well as a new 2006 daily fine-particulate matter NAAQS issued after CAIR was promulgated. The Transport Rule follows the same basic two-step analysis to determine significant contribution under the good-neighbor provision that EPA adopted in its prior good-neighbor rulemakings. EPA first conducted a "screening analysis" based on air-quality modeling to exclude States from coverage based on their minimal contribution to air pollution concentrations in downwind nonattainment and maintenance areas. In the second "control analysis" portion of the evaluation, EPA established baseline emissions-control obligations for upwind States not excluded by the agency's screening analysis.

EPA projected that the Transport Rule would enable a number of downwind States to timely attain the ozone NAAQS and almost all of these States to timely attain the fine particulate matter NAAQS. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone (FIPs Rule), 76 Fed. Reg. 48,208, 48,307-08 (Aug. 8, 2011). The Transport Rule further aligns the deadlines for upwind States to comply with their good-neighbor obligations with the deadlines for downwind States to comply with the NAAQS. *Id.* at 48,214.

More than a year prior to promulgating the Transport Rule, EPA had published findings that twenty-nine States and territories had failed to submit SIPs addressing their good-neighbor obligations or had submitted SIPs which failed to contain adequate good-neighbor controls.

See Finding of Failure to Submit Section 110 State Implementation Plans, 75 Fed. Reg. 32,673 (June 9, 2010); FIPs Rule, 76 Fed. Reg. at 48,219. The disapprovals triggered EPA's statutory obligation to issue FIPs for those States, 42 U.S.C. § 7410(c), and EPA issued FIPs as part of the Transport Rule.

6. Several upwind States and private companies whose emissions would be subject to the Transport Rule petitioned in the court of appeals for review. A divided panel of the court vacated the Rule. The majority held that EPA's definition of significant contribution in the Transport Rule was contrary to the good-neighbor provision. EPA Pet. App. 21a-41a. The majority further held that EPA's issuance of FIPs in the Rule was improper because States have no independent duty to comply with the good-neighbor provision. *Id.* 42a-61a. The majority concluded that good-neighbor protections were contingent on EPA first defining the amount by which each upwind State contributed significantly to nonattainment or interference with maintenance of NAAQS attainment in other States. *Id.* 45a-48a. Only then, and only after States were given "reasonable time" to issue SIPs after EPA's rulemaking, would States have an obligation to address interstate pollution in their SIPs. *Id.* Thus, EPA could not invalidate the relevant SIPs here, because the SIPs were submitted before the Transport Rule was finalized, and so FIPs to enforce the good-neighbor requirements were also premature. *Id.* 42a-43a.

Judge Rogers, who was also on the panel for the *North Carolina* decision, dissented. She concluded first that the petitioners had waived any argument that States had no good-neighbor duties unless EPA first established

significant contribution amounts, because that argument was a collateral attack on EPA's prior, and generally unchallenged, determinations that the States had not met their good-neighbor duties. *Id.* 70a-82a. Even if the issue had been properly raised, Judge Rogers reasoned that nothing in the text of the Clean Air Act made good-neighbor protections contingent on EPA rulemaking, or relieved States of their primary obligation to comply with the good-neighbor provision. *See id.* 83a-95a. Therefore, the dissent concluded that EPA properly issued FIPs to enforce the long-overdue emission-reduction requirements. *Id.* 86a. Judge Rogers also explained that the petitioners had waived the argument that EPA's approach to determining significant contribution was unlawful. *Id.* 95a-110a. Even if the argument had been properly before the court, she would have concluded that the Transport Rule was consistent with the language of the good-neighbor provision and the court's prior decisions interpreting the provision. *Id.* 110a-114a.

THE PETITIONS FOR CERTIORARI SHOULD BE GRANTED

The Clean Air Act creates a federal-state partnership for implementation of air-quality standards. Congress carefully delineated the complementary responsibilities of EPA and the States under the Act. The court of appeals' decision, however, exempts States from their primary and independent responsibility under the good-neighbor provision, and by doing so, distorts the statutory scheme that Congress crafted and the division of responsibilities that Congress intended. This Court's review is necessary to avoid the widespread adverse consequences that the decision will cause.

Because the good-neighbor provision is central to the Clean Air Act's design and intended function, the implications of the court of appeals' error extend far beyond an ordinary case of technical statutory misinterpretation. Eliminating the independent obligation of States to remedy their significant contributions to air pollution in downwind areas disables a necessary mechanism for downwind States to attain timely NAAQS compliance. Instead, the court of appeals made good-neighbor protections contingent on rulemaking by EPA.

But the Clean Air Act does not require federal action to trigger good-neighbor obligations. The Act specifically makes each State responsible in the first instance for addressing its downwind impacts in a SIP, thus tying good-neighbor obligations to the Act's mandatory SIP-submission deadlines. The court of appeals' contrary ruling contorts the Act's calibrated scheme. Even if EPA could promulgate a rule that satisfies the court of appeals' criteria, the lengthy delay involved and the removal of States' independent obligations to control their downwind emissions fatally disrupts the interconnected series of compliance deadlines and attainment goals the Clean Air Act contemplates. *See* EPA Pet. at 16-17. The repercussions of that error are widespread and ongoing: downwind States and localities and EPA will have to search for alternative means to achieve Congress's statutory plan for achieving safe air quality—and such means may not be available. Those governmental and administrative efforts will implement a stopgap scheme that increasingly veers from the intended template of the Act and will not assure the full, robust protections that Congress provided under the good-neighbor provision.

A. The Clean Air Act Imposes Parallel Independent Obligations on States to Control Emissions That Cause In-State and Interstate Air Pollution.

The Clean Air Act makes States primarily responsible for regulating and controlling air pollution. *See* 42 U.S.C. §§ 7401(a)(3), 7407(a). While EPA is charged with setting and updating NAAQS under sections 108 and 109 of the Act, *id.* §§ 7408, 7409, the Act places the responsibility for achieving NAAQS compliance on the States. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). Thus, under section 110 of the Act, each State must submit a SIP that: (1) controls in-state emissions that degrade the State's own air quality; and (2) also contains adequate good-neighbor provisions to redress the State's significant contribution to pollution in other States. 42 U.S.C. §§ 7410(a)(1) & (a)(2)(D)(i)(I).

The Act sets forth these dual state obligations in equivalent terms, imposing parallel emissions-control requirements on the States. Section 110(a)(2) lists the thirteen fundamental requirements for a SIP. Twelve of those requirements—subparagraphs (A) through (C) and (E) through (M)—focus on in-state obligations. Subparagraph (D) sets forth the Act's good-neighbor provision, requiring a State to also control emissions that cause harm outside the State. The statute does not differentiate between the listed SIP obligations. All the requirements are subject to the same deadline: they must all be met in a SIP submitted within three years of EPA's promulgation of a NAAQS. *Id.* § 7410(a)(1).

The parallel nature of all the SIP obligations—to address both in-state and out-of-state harms of air

pollution—makes sense. Pollution has the same harmful effect regardless of its source, and Congress enacted the good-neighbor provision to ensure that States bore equal responsibility for the effect of air pollution caused by in-state sources—whether the harmful effect manifests within the State or in other areas outside state borders. *See* S. Rep. No. 95-127, *supra*, at 42.

B. The Court of Appeals Improperly Exempted States from Their Independent Good-Neighbor Obligations That Are Central to the Function, Design, and Timeframes Imposed by the Act.

The court of appeals, however, rewrote the express language of the Act, relieving States of their obligations to submit good-neighbor implementation plans until (and unless) EPA first defines the nature and scope of required emissions reductions. The court reasoned that because determining the level of emission reductions necessary to satisfy a State's good-neighbor obligations "is analogous to setting a NAAQS," EPA must first determine the amounts of States' significant contributions to downwind air pollution before statutory good-neighbor protections are triggered. EPA Pet. App. 53a.

The court of appeals' analogy to the NAAQS is inapt because section 110(a)(2)—including the good-neighbor provision—lists the obligations of the *States*—not the obligations of EPA—and therefore charges the *States* with responsibility for eliminating in-state emissions that contribute significantly to downwind air-quality problems. Section 110 requires that "[e]ach State shall . . . adopt" a SIP and that each SIP "shall . . . contain adequate provisions" addressing out-of-state impacts. 42 U.S.C. §§ 7410(a)(1)

& (a)(2)(D)(i). The statutory section addressing the NAAQS, by contrast, expressly directs the Administrator of EPA to promulgate the NAAQS. *Id.* § 7409(a)(1)(B).

Deviating from the express statutory language here, and from the statute's express delineation of State and EPA responsibilities, is especially dangerous because the Act establishes a coordinated strategy for achieving air-quality standards. Without the immediate protections of the good-neighbor provision, downwind States will not be able to meet air-quality standards and maintain their compliance with the NAAQS within the specific timetables that Congress imposed. The Clean Air Act establishes an interlocking series of deadlines, carefully crafted to maximize the potential for expeditious and comprehensive NAAQS attainment. See *supra* at 3-4. The only triggering event for States to adopt SIPs that address both in-state and out-of-state pollution by in-state sources is EPA's promulgation of a NAAQS, a federal requirement subject to defined statutory deadlines. 42 U.S.C. §§ 7408, 7409.

In place of a coordinated statutory framework where SIP obligations are triggered by adoption of a NAAQS, and where good-neighbor protections are aligned with downwind States' statutory deadlines for complying with the NAAQS, the court of appeals impermissibly imposed its own judicially invented requirements unmoored from the timeframes imposed by Congress. While the statute unambiguously imposes on downwind States specific air-quality compliance deadlines, under the court of appeals' interpretation of the statute, there is no statutory deadline *at all* for triggering good-neighbor protections—only the open-ended contingency that EPA might promulgate a rule to define upwind States' good-neighbor obligations. Even after EPA finished such a rulemaking and the rulemaking

survived judicial review, upwind States would have to be afforded "reasonable time" to adopt SIPs that address their contribution to out-of-state pollution. EPA Pet. App. 47a. Only then would the good-neighbor provision finally become enforceable.

But Congress did not draft the Clean Air Act to delay good-neighbor protections until EPA provides guidance, nor is the "reasonable time" limitation found anywhere in the text of the statute. Adding these additional hurdles, which Congress did not contemplate, fatally disrupts the statutory blueprint and flies in the face of this Court's directive in *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, that a court of appeals may not "engraft[ ] [its] own notions of proper procedures upon agencies entrusted with substantive functions by Congress." 435 U.S. 519, 525 (1978).

C. States Are Capable of, and Experienced in, Analyzing Their Contributions to Air-Quality Problems in Downwind Areas.

In imposing these extrastatutory requirements, the court of appeals assumed that States lack the capacity to conduct the same modeling or analysis that EPA conducts to determine their significant contributions to air quality problems in downwind States. EPA Pet. App. 89a (Rogers, J., dissenting). But that assumption is refuted by real-world experience demonstrating that States can meaningfully model and determine their contributions to interstate air pollution in the first instance.

States can and do perform complex air quality modeling, *id.* 89a-90a (Rogers, J., dissenting), and States can and do organize themselves into coalitions

that perform regional modeling of air pollution using the same methodology and forms of data as the EPA. *See, e.g.*, Approval and Promulgation of Air Quality Implementation Plans (IL, IN, MI, MN, OH, WI), 77 Fed. Reg. 45,992, 46,006 (Aug. 2, 2012) (modeling by regional state consortium); Approval and Promulgation of Implementation Plans (GA), 77 Fed. Reg. 38,501, 38,506 (June 28, 2012) (modeling by coalition of southeastern States). Delaware, for example, successfully modeled its downwind contributions to other States and gained EPA approval of a good-neighbor SIP revision for the 2006 fine-particulate matter NAAQS. *See* Approval and Promulgation of Air Quality Implementation Plans (DE), 76 Fed. Reg. 53,638 (Aug. 29, 2011). EPA has also approved interstate transport SIPs for Colorado and other States that conducted the necessary analysis to determine and redress their significant contributions to out-of-state air pollution (*see* EPA Pet. at 18).

In addition, States have also developed experience under section 126 of the Act, 42 U.S.C. § 7426(b), which gives States the ability to petition EPA for a finding that out-of-state sources are emitting air pollutants that significantly contribute to nonattainment of a NAAQS in a petitioning State. Section 126(b) gives downwind States a remedy based on a showing of significant contribution, the same analysis that upwind States must conduct under the good-neighbor provision. To make a prima facie case under section 126(b), a state must perform its own air pollution modeling demonstrating the significant contribution of the upwind source(s). *See* Final Response to Petition From New Jersey Regarding SO_2 Emissions from the Portland Generating Station, 76 Fed. Reg. 69,052, 69,057-58 (Nov. 7, 2011) (describing modeling performed by New Jersey in support of its section 126(b) petition);

see also North Carolina ex rel. Cooper v. TVA, 593 F. Supp. 2d 812, 825 (W.D.N.C. 2009) (relying on modeling and analysis submitted by North Carolina to conclude that certain out-of-state power plants in three upwind states "contribute significantly to ozone levels within numerous North Carolina counties"), *rev'd on other grounds*, 615 F.3d 291 (4th Cir. 2010).

The court of appeals' ruling, however, disempowers States, discouraging them from proactively identifying and addressing their air pollution, as the Act directs and as States have done in the real world, until EPA defines their responsibilities for them.

D. The Court of Appeals' Ruling Distorts the Function and Enforcement of the Clean Air Act and Delays Compliance with Air-Quality Standards, Thus Causing Serious Public Health and Economic Harm.

The cascading consequences of the court of appeals' ruling warrant immediate review by this Court. Delaying enforcement of the good-neighbor provision beyond the three-year SIP deadline set by Congress makes adherence to the coordinated timeframes imposed by the Clean Air Act virtually impossible. Enforcement will not be tied to any event with a clear statutory deadline, but will instead be based on events and timing contingencies divorced from the statute.

As EPA explains, the court of appeals' holding renders the Act's NAAQS attainment deadlines a practical nullity for downwind States. EPA Pet. at 29-30. An enormous expenditure of administrative effort will be necessary for EPA to issue new significant-contribution findings,

and EPA must then give States additional time, which the agency projects to be several more years, to develop a strategy to implement those findings through the SIP process. The court of appeals' rulings on exhaustion and restrictions on EPA's interpretation of "contribute significantly" will only make the rulemaking process more prolonged and complex. *See id.* at 18-28.

The court of appeals' holding inverts the Act's incentive structure to reward and encourage inaction and delay. Because States have no obligation to remedy their contribution to downwind air pollution until EPA acts first, the incentives for States to take action shift. While Congress enacted a three-year deadline for SIPs that required States to take timely proactive action to control their contributions to downwind air pollution, the court of appeals' decision encourages States (and regulated industrial parties) to follow "a maximum delay strategy." EPA Pet. App. 114a (Rogers, J., dissenting). As long as States and regulated sources can challenge and delay EPA rulemakings defining significant contribution under the good-neighbor provision, they can avoid the emissions reductions necessary to ensure NAAQS attainment in downwind States.

The result is a potentially endless loop of delay. The Transport Rule addresses three distinct NAAQS, two of which are already over fifteen years old. See *supra* at 6. The court of appeals' decision exempts upwind States from fully addressing their contribution to downwind nonattainment of those NAAQS. In the meantime, EPA has recently revised the applicable NAAQS for eight-hour ozone and annual fine particulate matter. EPA Pet. at 6 n.4. Those 2008 and 2013 revisions, however, will not

be fully enforceable within three years, as the statute contemplates. Under the court of appeals' ruling, States have no good-neighbor obligations for the new NAAQS until and unless an EPA rulemaking is completed and legal challenges settled, a period that could easily take five or more years, exceeding the deadlines for NAAQS attainment and resulting in the States working on complying with a NAAQS for a given pollutant even after EPA has already issued a new, more stringent NAAQS for that same pollutant.

Permitting EPA to enforce CAIR as an interim measure may mitigate some of the harm of exempting States from independently enforceable good-neighbor obligations, but the practical need for CAIR demonstrates why Congress would not—and did not—make enforcement of good-neighbor protections contingent on EPA action as a first and necessary step. If CAIR is too "intertwined with the regulatory scheme" to vacate fully, *North Carolina*, 550 F.3d at 1179 (Rogers, J., concurring), and if it unacceptably harms "environmental values" not to have enforceable good-neighbor protections in place, *id.* at 1178, then a statutory reading that leads to the same result—because it would leave the good-neighbor provision indefinitely unenforceable—should not be upheld.

The Court should settle this issue. Even if EPA and downwind States could take steps to prevent further delay and to reduce the harm from unremedied interstate air pollution, implementation of the Act would increasingly diverge from the coherent statutory framework Congress enacted. Without a firm statutory deadline for independent enforcement of the good-neighbor provision, the Act's deadlines for EPA to issue and revise NAAQS and for

States to achieve compliance would lack practical meaning. The timely attainment of air-quality standards would be significantly if not indefinitely postponed; the statutory framework and time-frames could remain forever out of step. Immediate intervention from this Court will prevent that harm, which will be almost impossible to cure at a later stage.

Review is also warranted because continued delay imposes an especially intolerable burden on downwind States and cities. These burdens include direct harm from fine particulate matter to residents of these States. Because the Transport Rule requires larger and more aggressive reductions in sulfur dioxide than CAIR requires, it would avoid many more premature deaths attributable to fine-particulate matter than CAIR does. *See* Federal Implementation Plans to Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 45,210, 45,217 (Aug. 2, 2010) (Table III.A-4).

Regarding ozone pollution, some areas of the country, especially in the northeast, continue to struggle to comply even with the 1997 NAAQS. For example, the Baltimore, Maryland area has ozone concentrations well above that 1997 NAAQS of 0.08 parts per million (ppm). *See* EPA, Design Values—Period Ending 2011, Ozone Detailed Information, Table 1a (showing 0.092 ppm concentration of ozone), *available at* http://epa.gov/airtrends/values.html. Ozone pollution has worsened in the Baltimore area despite the fact that Maryland passed legislation requiring the State's fossil-fueled power plants to cut their emissions of nitrogen oxides by nearly seventy percent from 2002 levels; this worsening ozone pollution is attributable in large part to upwind emissions. Other major metropolitan

areas, such as New York City, Philadelphia, the District of Columbia, and Chicago are in nonattainment of the updated ozone standards, and have seen average ozone levels in recent years—while CAIR has been in place—stay the same or even worsen. *See* EPA, Design Values, Ozone Detailed Information, *supra*, Table 3a, cols. K & L (showing average ozone concentrations in these areas have worsened or stayed the same from 2008 to 2011). Because ozone pollution in these areas, as in Baltimore, is attributable in large part to upwind emissions, delays in addressing transported pollution will translate into more premature death and illness. The health harms and attendant costs from downwind nonattainment with the NAAQS will persist for years under the court of appeals' decision because it defers meaningful interstate pollution controls in contravention of the Clean Air Act.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted,

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RESPONDENT'S BRIEF

Nos. 12-1182, 12-1183

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IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, NORTH CAROLINA, RHODE ISLAND, VERMONT, AND THE DISTRICT OF COLUMBIA, AND THE CITIES OF BALTIMORE, BRIDGEPORT, CHICAGO, NEW YORK, AND PHILADELPHIA AS RESPONDENTS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Clean Air Act's "good neighbor" provision mandates that "[e]ach State shall" adopt an implementation plan to prohibit emissions in the State that "contribute significantly" to degradation of air quality in downwind States, or that interfere with downwind States' maintenance of air-quality standards. *See* 42 U.S.C. § 7410(a)(2)(D)(i). The Act authorizes the Environmental Protection Agency to issue a federal implementation plan for a State if that State fails to adopt a plan or if the State's plan fails to meet the Act's defined requirements. *Id.* § 7410(c)(1). The question presented is:

> Whether States must meet their express statutory obligation to adopt a plan controlling pollution that affects the air quality of downwind States, even if EPA has not first specifically quantified that obligation.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7.

JURISDICTION

A timely petition for rehearing or rehearing en banc was denied on Jan. 24, 2013. Pet. App. 1459a-1462a. The Court of Appeals issued its mandate to EPA on February 4, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The following statutory provision is reproduced in the petition appendix: 42 U.S.C. § 7410. *See* Pet. App. 1463a-1498a.

INTRODUCTION

As this Court recognized more than a century ago, air pollution originating in one State can cause significant harm to the environment and public health in other States. *See Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 238-39 (1907). Congress specifically addressed the problem of interstate air pollution in the Clean Air Act through a measure known as the "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D), which requires States to take responsibility for the serious consequences of their air pollution on downwind States, *see* S. Rep. No. 95-127, at 42 (1977). EPA promulgated the rule at issue here, known as the Cross-State Air Pollution Rule (or Transport Rule), Pet. App. 117a-1458a (76 Fed. Reg. 48,208 (Aug. 8, 2011)), after nearly fifteen years in which many States failed to meet their good-neighbor

obligations for two pollutants, ozone and fine particulate matter (also known as $PM_{2.5}$).

Respondent States and Cities in Support of Petitioners file this brief to address the second question on which this Court granted certiorari: whether States must meet their independent obligation to address the downwind effects of their air pollution, even if EPA has not defined that obligation in a rulemaking such as the Transport Rule. The Clean Air Act unambiguously imposes such a duty. The Act's plain language requires States to take the lead in formulating and adopting implementation plans that satisfy their good-neighbor obligations. Only if a State fails to submit a plan or if the plan submission is inadequate does EPA then promulgate its own implementation plan to address that State's cross-state pollution—a federal backstop when state efforts fall short. The court of appeals' holding below reverses this structure, requiring EPA to act first to quantify the States' good-neighbor obligations, and permitting upwind States to ignore the effects of their air pollution on other States until EPA chooses to act. Because the plain language of the Clean Air Act precludes this interpretation of the statute's good-neighbor provision, this Court should reverse the judgment below.[1]

---

[1] Respondent States and Cities in Support of Petitioners concur with Federal and Nongovernmental Petitioners that the court of appeals lacked jurisdiction to consider respondents' challenges to the Transport Rule, and that the court of appeals erred in holding that EPA impermissibly interpreted the statutory term "contribute significantly."

STATEMENT OF THE CASE

A. Cooperative Federalism under the Clean Air Act

Congress enacted the modern Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare." 42 U.S.C. § 7401(b)(1). The Act's goals are met through a cooperative-federalism process that carefully defines the related responsibilities of the States and the federal government in improving and preserving air quality.

1. The first step in the process is the establishment or revision of air-quality standards. EPA must set national ambient air quality standards (NAAQS) for certain air pollutants, and then review those NAAQS every five years. *Id.* § 7409(a)(1), (d)(1). A NAAQS sets the maximum concentration of a particular pollutant in the ambient air that will not harm public health or welfare. *See id.* § 7409(b); *see e.g.*, 75 Fed. Reg. 35,520 (June 22, 2010) (NAAQS for sulfur dioxide).

EPA then designates areas in each State as in "attainment" if they satisfy the NAAQS, or in "nonattainment" if they do not.[2] 42 U.S.C. §§ 7407(c), (d), 7511(a)(1). Nonattainment areas must achieve permissible levels of NAAQS pollutants "as expeditiously as practicable," but no later than five

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[2] Attainment classifications are pollutant-specific: an area may be as in attainment for one NAAQS pollutant, but in nonattainment for another pollutant.

years after designation for most pollutants.[3] *Id.* § 7502(a)(2)(A); *see also* Pet. App. 449a. Once an area achieves attainment, it is required to have in place "maintenance" measures to ensure that its air quality does not slip back into nonattainment. *See* 42 U.S.C. § 7410(a)(1).

2. After this initial standard-setting, the responsibility for meeting the NAAQS shifts to the States, reflecting Congress's judgment that preventing and controlling air pollution "at its source is the primary responsibility of States and local governments." *Id.* § 7401(a)(3). The key vehicle for meeting a State's obligations under the Clean Air Act is a state implementation plan (SIP), an umbrella term that describes the collection of state laws, regulations, and other measures that the State will use to achieve or maintain each NAAQS. *See id.* § 7407(a). The Act sets out thirteen measures that each State must adopt as part of its SIP. *Id.* § 7410(a)(2). For example, each SIP must "include enforceable emission limitations and other control measures" to meet or maintain the NAAQS according to defined "schedules and timetables for compliance," *id.* § 7410(a)(2)(A), and each SIP must provide for "air quality modeling" to predict the "effect on ambient air quality of any emissions of any air pollutant" for which EPA has set a NAAQS, *id.* § 7410(a)(2)(K).

In addition, as relevant here, each SIP must address the State's good-neighbor obligation to

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[3] More-specific sections of the Clean Air Act set deadlines of six or ten years for particulate matter and between three and twenty years for ozone, depending on the severity of the pollution in the area. 42 U.S.C. §§ 7511(a)-(b) & 7513(c).

prevent in-state emissions from seriously affecting downwind States' air quality. The Act's good-neighbor provision thus requires each SIP to contain "adequate" measures that

> prohibit[] . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will—(I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to [a NAAQS].

Id. § 7410(a)(2)(D).

3. Once a State has had the opportunity to adopt a SIP for a NAAQS, responsibility shifts back to the federal government. EPA may disapprove a SIP submission in whole or in part if the plan fails to satisfy the Act's requirements, including the good-neighbor obligation. *Id.* § 7410(c)(1), (k)(3). If EPA disapproves a SIP submission or finds that a State failed to make a required SIP submission altogether, the Act provides that EPA "*shall* promulgate" a federal implementation plan (FIP) as a substitute for the missing or defective SIP provisions. *Id.* § 7410(c) (emphasis added). This federal authority guards against a State's failure to comply with its duties under the Act and ensures that States cannot unilaterally delay implementing necessary measures to control air pollution.

4. Because one of the goals of the Clean Air Act is to achieve attainment of the NAAQS "as expeditiously as practicable," *id.* § 7502(a)(2)(A), the statute imposes interlocking deadlines to ensure the prompt implementation of a plan to satisfy the

NAAQS—regardless of whether that plan is of state or federal origin. Once EPA promulgates a new or revised NAAQS, States "shall . . . adopt and submit" SIPs "within 3 years" to address compliance with that NAAQS. *Id.* § 7410(a)(1). And when EPA disapproves a SIP submission or finds that a State failed to make a required SIP submission, EPA must promulgate a FIP "at any time within 2 years" of that disapproval or finding. *Id.* § 7410(c)(1). These short deadlines reflect the pressing need for measures to reduce air pollution to levels that are "*requisite* to protect the public health," *id.* § 7409(b)(1) (emphasis added).

B. The Good-Neighbor Provision

The Clean Air Act's good-neighbor provision plays a critical role in the States' ability to protect public health and welfare from the harm of air pollution. Pollution emitted in upwind States is carried on prevailing winds across state borders and degrades air quality in downwind States. But upwind States have little incentive to require reductions from in-state facilities when those reductions are not necessary to address their own problems with air quality. *See* S. Rep. No. 95-127, at 42. And downwind States generally cannot reach outside their borders to impose emissions controls on out-of-state sources. Congress included the good-neighbor provision among the other SIP requirements to ensure that upwind States would take responsibility for the downwind effects of their air pollution.

Since enacting the good-neighbor provision in 1970, Congress has amended it twice to strengthen the obligations of upwind States. The original version of the good-neighbor provision required "intergovernmental cooperation" to limit cross-state air pollution.

See S. Rep. No. 91-1196, at 13 (1970); *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 67 n.2 (1975). After courts interpreted "cooperation" to require only an exchange of information between States rather than affirmative steps to control pollution, *see, e.g., Natural Res. Def. Council, Inc. v. EPA*, 483 F.2d 690, 692 (8th Cir. 1973), Congress in 1977 amended the statute to clarify that States had an obligation not only to exchange information, but also to reduce emissions that would "prevent attainment or maintenance by any other State." *See* Clean Air Act Amendments, Pub. L. No. 95-95, § 108(a)(4), 91 Stat. 685, 693 (1977); *see also* S. Rep. No. 95-127, at 42.

Even that stronger language was not enough. By the time Congress considered the statute again, so much out-of-state air pollution was flowing into downwind areas, such as New York City and Connecticut, that those areas could not have met the ozone NAAQS even if they had entirely eliminated their own emissions.[4] Thus, in 1990, Congress again strengthened the good-neighbor provision and adopted the current language, requiring upwind States to limit emissions even if those emissions are not the sole cause of the downwind area's nonattainment. *See* S. Rep. No. 101-228, at 21.[5]

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[4] *See* S. Rep. 101-228, at 49 (1989); 4 *Legislative History of the Clean Air Act Amendments of 1990*, at 5076 (comp. by Cong. Research Serv. 1993) (comment of Sen. Lieberman, Senate debate, Jan. 31, 1990).

[5] See also Geoffrey L. Wilcox, *New England and the Challenge of Interstate Ozone Pollution under the Clean Air Act of 1990*, 24 B.C. Envtl. Aff. L. Rev. 1, 20 (1996).

But unchecked pollution from upwind States, including ozone and particulate matter, remains a problem for downwind States that cannot directly regulate it. Excess pollution imposes serious regulatory burdens on downwind States and on industry. *See* 42 U.S.C. §§ 7410(a), 7502(c)(5)-(6), 7503. Many downwind areas, particularly in the Northeast, still struggle to meet the ozone and particulate-matter NAAQS even though they have spent billions of dollars to achieve additional reductions of in-state emissions to compensate for out-of-state pollution.[6]

C. Previous Regulation of Ozone and Particulate Matter

1. This case concerns EPA's efforts to ensure that States control emissions of ozone and particulate matter under three standards that EPA has promulgated: a 1997 eight-hour ozone NAAQS, *see* 62 Fed. Reg. 38,856 (July 18, 1997); a 1997 annual NAAQS for fine particulate matter, *see* 62 Fed. Reg. 38,652 (July 18, 1997); and a 2006 daily NAAQS for fine particulate matter, *see* 71 Fed. Reg. 61,144 (Oct. 17, 2006).

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[6] *See, e.g.*, Decl. of George S. Aburn (Aburn Decl.) ¶ 5, *Kansas v. EPA*, (D.C. Cir. No. 11-1329) (Doc. No. 1339060) (Baltimore); Decl. of David J. Shaw (Shaw Decl.) ¶ 16, *Kansas v. EPA* (D.C. Cir. No. 11-1329) (Doc. No. 1339060) (New York); Letter from N.Y. State Dep't of Envtl. Conservation to EPA (June 20, 2012), *available at* www.dec.ny.gov/chemical/93201.html; Letter from Governor Jodi M. Rell, Comments on the Proposed Transport Rule (Sept. 28, 2010), *available at* www.regulations.gov, EPA-HQ-OAR-2009-0491-2780 (Connecticut); *see also* Reply Br. for the Federal Pet'rs at 3-4 & nn.2-5, No. 12-1182 (U.S. S. Ct. filed June 2013) (collecting sources).

Ozone forms in the atmosphere when other pollutants, including nitrogen oxides, react in the presence of sunlight. Fine particulate matter may be directly emitted through the combustion of fossil fuels or formed in the atmosphere from substances (including nitrogen oxides and sulfur dioxide) that are emitted from coal-fired power plants or other sources. Exposure to these pollutants harms public health by causing premature mortality and illness, including asthma and heart attacks. *See* Pet. App. 165a-168a.[7] These pollutants also harm public welfare by damaging forests and farm crops, creating haze and reducing visibility in scenic areas, acidifying lakes and streams, killing fish, and rendering waterways lifeless. *See* Pet. App. 627a-628a; Aburn Decl., *supra*, ¶ 10; Shaw Decl., *supra*, ¶¶ 19-25.

Both ozone and fine particulate matter have wide-ranging and harmful effects across the States because of their ability to be carried on the wind for miles across state borders. *See* 69 Fed. Reg. 4,566, 4,575 (Jan. 30, 2004); 63 Fed. Reg. 57,356, 57,360 (Oct. 27, 1998). For example, the northeastern States suffer from an "ozone plume" that originates in States to the west and south and travels east and north toward Maryland, New York, New Jersey, and

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[7] *See also* EPA, Integrated Science Assessment for Ozone and Related Photochemical Oxidants 1-4 (Feb. 2013) (EPA/600/R-10/076F), *available at* cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=247492; EPA, Integrated Science Assessment for Particulate Matter 2-8 (Dec. 2009) (EPA/600/R-08/139F), *available at* cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=216546.

on to New England. S. Rep. No. 101-228, at 49.[8] Ozone in the plume travels quickly and at high altitude during the night because of cooler temperatures; in the early morning, as temperatures rise, this ozone lowers and mixes with local ozone. On bad ozone days, "the Mid-Atlantic has lost the ozone battle before the sun comes up."[9]

2. In 2005, after years of delays during which the States did not submit adequate good-neighbor SIPs, EPA issued formal findings that the States had failed to submit SIPs addressing their good-neighbor obligations under one or both of the two 1997 NAAQS. 70 Fed. Reg. 21,147 (Apr. 25, 2005). EPA then promulgated the Clean Air Interstate Rule (CAIR)—a rule regarding States' good-neighbor responsibilities that preceded the Transport Rule—to establish a federal framework for limiting the downwind effects of interstate ozone and particulate matter pollution. 70 Fed. Reg. 25,162 (May 12, 2005). CAIR's defining feature was a regional cap-and-trade program to accomplish these reductions. *See id.* at 25,273. To implement CAIR, EPA promulgated FIPs within the year. *See* 71 Fed. Reg. 25,328, 25,330 (April 28, 2006). It later approved good-neighbor SIP submissions from the majority of the CAIR States, but left EPA-promulgated FIPs partially or fully in place in six States for one or both of the NAAQS. (*See* C.A. App. 3171-3172, 3174, 3176-3178.)

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[8] *See also* Md. Dep't of the Env't, Comments on Proposed Transport Rule, App. F (Maryland's Conceptual Model), at slides 21-22 (Sept. 29, 2010) (Md. Comments), *available at* www.regulations.gov, EPA-HQ-OAR-2009-0491-2788.

[9] *See* Md. Comments, *supra*, Attach. 1, at 22.

Also in 2006, EPA issued the 2006 particulate-matter NAAQS, which updated, in part, the 1997 NAAQS for that pollutant.[10] CAIR did not address the States' good-neighbor obligations under the 2006 NAAQS; nor were those obligations addressed by EPA's CAIR FIPs, or by the States' SIP submissions under CAIR.

3. In 2008, the court of appeals vacated CAIR for not fully addressing the States' good-neighbor obligations under the Clean Air Act. *North Carolina v. EPA*, 531 F.3d 896, 908, 910-11 (D.C. Cir. 2008) (per curiam). In particular, the court found that CAIR's cap-and-trade program improperly permitted upwind States to evade their statutory duty to limit their contribution to air pollution in particular downwind nonattainment areas,[11] and failed to align the upwind States' deadlines for reducing interstate air pollution with downwind States' deadlines for achieving the NAAQS. *Id.* at 912. On petitions for rehearing, the court remanded CAIR without vacatur to preserve the limited air-quality benefits that CAIR provided. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

4. After *North Carolina*, EPA issued a guidance memorandum reminding States that CAIR did not address the 2006 particulate-matter NAAQS, and

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[10] The 1997 particulate-matter NAAQS included an annual and a daily standard. 62 Fed. Reg. 38,652. The 2006 revision strengthened the daily standard while retaining the annual standard. 71 Fed. Reg. 61,144; *see also* Pet. App. 166a.

[11] The program allowed States to "purchase enough . . . allowances to cover all their current emissions, resulting in no change" to their cross-state emissions. *North Carolina*, 531 F.3d at 907.

that the States were thus required to determine their good-neighbor obligations under that air-quality standard. (C.A. App. 3378.) But even a year after this guidance, twenty-nine States and territories "ha[d] not made a SIP submittal" to address this point. *See* 75 Fed. Reg. 32,673, 32,674 (June 9, 2010). EPA gave notice that this inaction triggered the two-year deadline for EPA to promulgate FIPs for the noncompliant States and territories. *Id.* at 32,674. Only three States—Georgia, Kansas, and Ohio—sought judicial review of these SIP disapprovals, in separate proceedings that were not consolidated with this action. *See* Pet. App. 74a.

Ten other States did submit SIPs with good-neighbor provisions regarding the 2006 particulate-matter NAAQS. But none of those States conducted a proper technical analysis or otherwise adequately demonstrated that their SIPs' emissions-reduction measures would limit their cross-state pollution sufficiently to comply with their obligations under the 2006 NAAQS.[12] In addition, with regard to the 1997 ozone and particulate-matter NAAQS, twenty-two States maintained CAIR SIPs through 2011 despite CAIR's invalidation. *See* Pet. App. 177a-178a.

D. The Transport Rule

In 2011, EPA replaced CAIR with the Transport Rule to address the States' good-neighbor obligations under the 2006 particulate-matter NAAQS and the 1997 ozone and particulate-matter NAAQS. The

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[12] *See* C.A. App. 3168-3175 (discussing SIPs submitted by Alabama, Georgia, Indiana, Kansas, Kentucky, Michigan, New York, New Jersey, North Carolina, and Ohio).

Transport Rule used a formula that incorporated both air-quality and cost factors to identify upwind States whose emissions contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to these NAAQS. Pet. App. 128a-160a, 310a-316a. The formula incorporated a numerical threshold to determine whether an upwind State contributes significantly to a downwind State's air pollution; a group of States had suggested that threshold to EPA based on the States' own extensive analysis of cross-state air pollution.[13]

As part of the Transport Rule, EPA also issued FIPs for twenty-one States that had failed to submit good-neighbor SIPs adequately addressing the 2006 particulate-matter NAAQS. *See, e.g.*, Pet. App. 171a-172a n.12. These FIPs established statewide emissions "budgets" for certain pollutants and created pollution trading programs to provide sources with flexibility over how they reduced their emissions. Pet. App. 427a-428a. However, the Transport Rule invited States to submit SIPs to replace the FIPs in time for the SIPs to be in force by 2014.[14] *See* Pet. App. 669a-689a.

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[13] *See* Ozone Transport Commission (OTC) Letter to EPA at 5 (Sept. 10, 2009), *available at* www.regulations.gov, EPA-HQ-OAR-2009-0491-0013; OTC Letter to EPA Administrator at 2 (Sept. 2, 2009), *available at* www.otcair.org/upload/Documents/Correspondence/Final%20Recommendation%20Letter_090902.pdf; Northeast States for Coordinated Air Use Management, Comments on the Proposed Transport Rule (Oct. 1, 2010), *available at* www.regulations.gov, EPA-HQ-OAR-2009-0491-2694; *see also* 75 Fed. Reg. 45,210, 45,341 (Aug. 2, 2010); Pet. App. 256a.

[14] The Transport Rule also corrected EPA's prior approvals of SIP revisions for the 1997 ozone and particulate-matter NAAQS. EPA had issued those approvals based on the

(*continues on next page*)

EPA projected that the Transport Rule would enable a number of downwind States to timely attain the 1997 ozone NAAQS and almost all of the States to timely attain the 1997 and 2006 particulate-matter NAAQS. Pet. App. 449a-455a. EPA also estimated that the Transport Rule's anticipated emissions reductions would produce significant health benefits—including reducing premature deaths, heart attacks, chronic bronchitis, hospital admissions, and aggravated asthma—while avoiding millions of days of lost work and restricted activity due to respiratory illness. Pet. App. 601a-605a.

In rulemakings separate from the Transport Rule, EPA also approved Delaware's and Colorado's good-neighbor SIP submissions under the NAAQS at issue here. *See* 76 Fed. Reg. 53,638 (Aug. 29, 2011); 77 Fed. Reg. 1,027 (Jan. 9, 2012); 75 Fed. Reg. 31,306 (June 3, 2010). Each of these States had submitted a technical analysis based on its own modeling of interstate air pollution, which showed that the State did not contribute significantly to downwind nonattainment or interfere with maintenance of attainment. *See* 76 Fed. Reg. 2,853, 2,854 (Jan. 18. 2011); 75 Fed. Reg. 16,032, 16,034 (Mar. 31, 2010). EPA agreed with the States' conclusions based on its review of the States' analyses, the States' comments on the proposed rulemaking, and EPA's own data. 77 Fed.

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assumption that CAIR was valid. Because *North Carolina* found CAIR inconsistent with the Clean Air Act, EPA "rescind[ed] any statements" in those approvals suggesting that the SIPs satisfied the States' statutory good-neighbor obligations. Pet. App. 173a-174a; *see also* 42 U.S.C. § 7410(k)(6) (authorizing EPA to correct any action approving a SIP or SIP revision when the action was "in error").

Reg. at 1,030; 75 Fed. Reg. at 31,307. As a result, neither Delaware nor Colorado was included in the Transport Rule. Pet. App. 143a-144a.

E. Proceedings Below

A number of upwind States and industry groups challenged the Transport Rule. A divided panel of the court of appeals granted their petitions for review and vacated the rule on two independent grounds. First, the majority held that EPA had ignored three "red lines" that were implicit in the statute when it interpreted the term "contribute significantly" in the good-neighbor provision; as a result, the Transport Rule might impermissibly require upwind States to reduce their emissions by more than the Clean Air Act requires. Pet. App. 21a-41a.

Second, the majority held that EPA's issuance of FIPs was improper because EPA did not give States a "reasonable time" to "implement" the Transport Rule's good-neighbor standards. Pet. App. 47a. The majority decided that States are not required to evaluate their good-neighbor obligations or to submit an implementing SIP until EPA first specifies whether and how much States must reduce their emissions. Pet. App. 42a-61a.

Judge Rogers dissented. She would have held that the court lacked jurisdiction to address the argument that States have no independent good-neighbor obligations because the States had not raised that objection to EPA's earlier SIP disapprovals. Pet. App. 70a-82a. Even if the court had jurisdiction, Judge Rogers found no textual support in the Act for the majority's new rule that EPA must quantify the States' obligations first. *See* Pet. App. 83a-95a. She therefore concluded that EPA had properly issued

FIPs to implement the long-overdue measures required by the Act to reduce interstate air pollution. Pet. App. 93a-95a.

Judge Rogers would also have held that the court lacked jurisdiction to entertain petitioners' challenge to EPA's interpretation of the term "contribute significantly" in the Transport Rule because that challenge was not raised during the administrative proceedings. Pet. App. 95a-110a. Had the court possessed jurisdiction, however, she would have concluded that EPA's interpretation was consistent with the language of the good-neighbor provision. Pet. App. 110a-114a.

SUMMARY OF ARGUMENT

The Clean Air Act's cooperative-federalism scheme carefully delineates the complementary responsibilities of EPA and the States to ensure that the Act's goals of reducing pollution are met. Once EPA promulgates or revises a NAAQS, the Act unambiguously requires States to adopt plans within three years to meet the new standard. And the Act's good-neighbor provision just as clearly requires those implementation plans to address in-state emissions that seriously affect the air quality of downwind States. The Act thus requires States to move first to interpret and apply the Act and to make the policy choices necessary to implement their statutory obligations.

If a State fails to meet its obligations, responsibility shifts to EPA. To ensure that state inaction will not interfere with the prompt achievement and maintenance of air-quality standards, the Act unambiguously requires EPA to issue a federal

implementation plan within two years after finding that a State has failed to meet its obligations. This FIP backstop is crucial to achieving the Act's aim of limiting interstate air pollution because States have historically been reluctant to undertake costly measures to reduce pollution when the effects of that pollution are felt elsewhere.

Ignoring the Act's clear framework, the court of appeals distorted the division of responsibilities that Congress enacted by holding that the States' good-neighbor obligations are contingent on prior EPA rulemaking that quantifies those obligations. But no language in the statute supports this interpretation of the Act's requirements. To the contrary, the Act makes clear that the States are not passive implementers of EPA's policies; instead, the States are at the vanguard in defining and implementing the Clean Air Act, with EPA moving in to enforce the Act's requirements when a State's plan proves inadequate. There is no dispute that the States have the capability to play a lead role in preventing their own pollution from unduly harming downwind States, even without EPA's involvement—as demonstrated by their experience with both simple cross-border pollution problems and more complex issues requiring regional cooperation.

The court of appeals' decision turns the statute on its head. It puts States in a reactive posture when they address their good-neighbor obligations, rather than the lead role that the Act envisions. It allows upwind States to postpone the costs of air-pollution controls for years while, in the interim, downwind States and their residents are forced to suffer the present consequences of that pollution. It impedes EPA's ability to timely implement federal good-

neighbor measures for States that have failed to fulfill their statutory duties. And it interjects a new step into the Act's carefully calibrated SIP process, unmoored from the express deadlines that Congress enacted to ensure prompt achievement and maintenance of essential air-quality standards. The Court should reverse the judgment of the court of appeals to preserve the Act's unambiguous framework to address interstate air pollution.

ARGUMENT

I. The Clean Air Act Unambiguously Requires States to Implement Their Good-Neighbor Obligations in the First Instance and Mandates Federal Implementation Plans If States Fail to Do So.

By its plain terms, the Clean Air Act makes the States initially responsible for adopting measures that adequately limit the effects of their pollution downwind. If a State fails to meet its good-neighbor obligation, the Act in turn compels EPA to issue substitute measures to resolve the effects of interstate air pollution. EPA adhered to this statutory "division of responsibilities," *Train*, 421 U.S. at 79, when it promulgated FIPs as part of the Transport Rule after finding that States had not adopted SIPs adequately addressing their good-neighbor obligations. Because these statutory mandates are unambiguous, EPA properly "appl[ied] the statute according to its terms," *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009).

1. After EPA establishes or revises a NAAQS, the Clean Air Act allocates distinct responsibilities to the States and EPA to achieve that air-quality standard. The Act unambiguously requires the States to move

first. Within three years of EPA's promulgation or revision of a NAAQS, "[e]ach State *shall* . . . adopt and submit to" EPA a SIP that "provides for implementation, maintenance, and enforcement" of the NAAQS. 42 U.S.C. § 7410(a)(1) (emphasis added). The Act requires each State to adopt a SIP that *both* (1) controls in-state emissions that degrade the State's own air quality, *see, e.g, id.* § 7410(a)(2)(A); *and* (2) contains adequate good-neighbor measures to address the effects of the State's air pollution on downwind States, *see id.* § 7410(a)(2)(D).

The Clean Air Act's delegation of initial authority gives the States a primary role in determining how to reduce air pollution from in-state sources. "[S]o long as the national standards [are] met," States have "the power to determine which sources would be burdened by regulation and to what extent." *Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976). Congress deliberately gave "the states the initiative and a broad responsibility regarding the means" to achieve the NAAQS through their own implementation plans. *Bethlehem Steel Co. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). The States are thus charged with "determining and enforcing the specific, source-by-source emissions limitations which are necessary" to meet the NAAQS. *Train*, 421 U.S. at 64, 79.

In *Train*, this Court recognized the breadth of the States' initial responsibility to devise and implement the SIP measures necessary to attain the NAAQS. That case addressed the SIP obligation that States adopt such "enforceable emission limitations" as are "necessary or appropriate" to reach or preserve attainment. 42 U.S.C. § 7410(a)(2)(A); *see Train*, 421 U.S. at 78-79. The Court explained that the States had broad discretion to interpret and apply this

language, with EPA "relegated by the Act to a secondary role" of reviewing the States' initial plan for statutory compliance.[15] *Train*, 421 U.S. at 79.

The States' good-neighbor obligations are part and parcel of their other SIP obligations under the Clean Air Act. Congress intended the States to treat the in-state and out-of-state effects of their air pollution together, making each State "at least as responsible for polluting another State as it would be for polluting" within its borders. S. Rep. No. 95-127, at 42. The structure of the Act's SIP provisions reflect this unified approach to addressing air pollution: far from being set apart, the Act's good-neighbor provision appears in the same subsection as the other SIP provisions, in the middle of a list of duties that the Act requires the States to address in the same plan. *Compare* 42 U.S.C. § 7410(a)(2)(D), *with id.* § 7410(a)(2)(A)-(C), (E)-(M). There is no question that the States bear initial responsibility regarding the in-state subsections, and there is no indication that Congress intended the States to take on a different role for the identically styled interstate subsection.

Thus, under the plain language of the Act, the States have the principal and initial responsibility of devising and adopting a plan to achieve EPA's air-

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[15] Indeed, as further proof of States' discretion to choose how to regulate air pollution within their borders, States may adopt plans that are stricter than the national standards determined by EPA. *Union Elec. Co.*, 427 U.S. at 264-65. A State is free to make the "determination that it desires a particular air quality by a certain date and that it is willing to force technology to attain it—or lose a certain industry if attainment is not possible." *Id.* at 265. EPA may not object to such a determination. *Id.*

quality standards once those standards are promulgated. And the Act unambiguously designates the States' good-neighbor obligations as part of that plan. Nothing in the statute permits a State to defer its responsibility to limit interstate air pollution beyond the Act's express deadlines.

2. After the States have had the opportunity to adopt and implement their own plans, the Act requires EPA to review the States' SIP submissions for statutory compliance. *See id.* § 7410(k). That review authority is circumscribed. If EPA finds that a State's SIP meets all applicable requirements, then "[w]ithin 12 months," EPA "*shall* approve such submittal." *Id.* § 7410(k)(2)-(3) (emphasis added). As this Court has recognized, this language means that EPA "is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards," and has "no authority to question the wisdom of a State's choices." *Train*, 421 U.S. at 79 (emphasis added).

When, however, a State's SIP submission fails to satisfy the Act's requirements, or a State fails to timely make a required SIP submission altogether, the Act obligates EPA to fill the gap with its own implementation plan: EPA "*shall* promulgate" a FIP within two years of either (1) "find[ing] that a State has failed to make a required submission," or (2) "disapprov[ing] a [SIP] submission in whole or in part." 42 U.S.C. § 7410(c)(1) (emphasis added). Such a FIP is no half measure. Rather, EPA must "devise and promulgate a specific plan of its own" that will timely achieve the NAAQS. *Train*, 421 U.S. at 79. As Congress explained when it enacted this framework, the Act provides for "the substitution" of EPA authority for state authority to ensure that a plan is

in place to "attain the quality of ambient air established" by the NAAQS. S. Rep. No. 91-1196, at 12.

Nor are FIPs optional. The Act frames EPA's FIP responsibility in mandatory terms: EPA "*shall* promulgate" a FIP if certain predicate conditions are met. 42 U.S.C. § 7410(c)(1) (emphasis added). Indeed, Congress rejected a proposed amendment that would have left promulgation of FIPs solely to EPA's discretion. *See Coal. for Clean Air v. S. Cal. Edison Co.*, 971 F.2d 219, 223 (9th Cir. 1992) (citing S. 1630, 101st Cong. § 105 (1989)).

Finally, the Act does not permit a delinquent State to interfere with EPA's FIP responsibility after failing to meet its own duties to adopt an adequate SIP. As this Court has recognized, a State's failure to develop adequate SIPs "forfeit[s] to the EPA control over implementation of the NAAQS," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001); *see also Virginia v. EPA*, 108 F.3d 1397, 1406-07 (D.C. Cir.) (inadequate SIP "rescinds state authority to make the many sensitive and policy choices that a pollution control regime demands" (quotations marks omitted)), *modified on other grounds on reh'g*, 116 F.3d 499 (D.C. Cir. 1997).

3. EPA's promulgation of FIPs in the Transport Rule accords with the Act's unambiguous delineation of state and federal responsibilities. The NAAQS at issue here were already five and fourteen years old when the Transport Rule was finalized—well past the States' deadlines for submitting compliant SIPs. Every FIP in the Transport Rule followed EPA's disapproval of a SIP or EPA's finding that the covered State had failed to submit a SIP adequately addressing its good-neighbor obligations. Pet. App.

177a-183a. Having made these determinations, EPA was required under the Clean Air Act to issue FIPs to govern the States' good-neighbor obligations.

These FIPs did not improperly intrude on upwind States' autonomy, as the court of appeals suggested. *See* Pet. App. 55a. Congress has already expressly recognized, through the good-neighbor provision, that downwind States' compelling interests in public health and welfare should not be sacrificed to preserve upwind States' sole control over emissions restrictions. And when, as here, upwind States fail to control the harmful effects of their emissions on their neighbors, the Act compels EPA to exercise its supervisory role to protect the downwind States' interests.

Contrary to the court of appeals' suggestion (Pet. App. 55a-56a), there is nothing unprecedented in EPA's issuance of FIPs in these circumstances. For example, EPA issued FIPs to implement CAIR less than a year after promulgating that rule. 71 Fed. Reg. at 25,330. To be sure, EPA intended for the CAIR FIPs to remain in place only until the States implemented SIPs that reflected their own approaches to achieving CAIR's standards.[16] *See id.* at 25,338-39. But EPA adopted a similar approach in the Transport Rule. Far from permanently displacing state authority, the Transport Rule expressly invites States to replace FIPs by later submitting adequate

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[16] EPA gave States notice of the FIP parameters before the deadline for States to submit their CAIR SIPs in order to give States the option of simply accepting the FIPs rather than devising their own SIPs. 71 Fed. Reg. at 25,338. Most CAIR States submitted SIPs that were approved, although six did not—leaving EPA's FIPs partially or fully in place. See *supra* at 10-11.

SIPs to EPA for approval. And the rule permits replacement SIPs to take effect as early as 2014. *See* Pet. App. 669a-689a.

Thus, the Transport Rule exemplifies the Act's cooperative-federalism model. The States had at least three years after each NAAQS to address their good-neighbor obligations, and EPA stepped in only after that time to ensure that those obligations would be satisfied.

II. States Are Not Excused from Addressing Their Good-Neighbor Obligations until EPA First Defines or Quantifies Those Obligations.

A. The Act's Plain Text Contains No Trigger for the States' Good-Neighbor Obligations Aside from EPA's Promulgation or Revision of a NAAQS.

Ignoring the Clean Air Act's plain text, the court of appeals invented a new federal prerequisite for state action that is found nowhere in the statute. The court held that States have no duty to comply with their good-neighbor obligations until EPA first "defines or quantifies" those obligations. Pet. App. 47a. But the Act is silent about such a prerequisite, and the court of appeals thus impermissibly "engrafted" its "own notions of proper procedures upon agencies entrusted with substantive functions by Congress," *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978).

The Clean Air Act identifies only one trigger for the States' good-neighbor obligation: EPA's promul-

gation or revision of a NAAQS. See *supra* at 3-4. As the NAAQS trigger demonstrates, when Congress intended for the States to wait for EPA, it knew how to require that, and it said so explicitly. In other, more specific provisions defining the States' SIP obligations, Congress likewise expressly made the States' duties conditional on prior EPA action: for example, requiring certain emissions-monitoring measures and reports "as may be prescribed" by the EPA, and such air-quality modeling as EPA "may prescribe." *Id.* § 7410(a)(2)(F), (K).

Congress also knew how to require EPA to provide advance guidance to the States—and again provided for that guidance explicitly. For example, the Act requires EPA to "promulgate minimum criteria that any [SIP] submission must meet." *Id.* § 7410(k)(1)(A). Likewise, when EPA issues what is known as a "SIP call" to require revisions to an existing "applicable implementation plan for any area," it must "notify the State of the inadequacies" and provide guidance and deadlines for the submission of a revised SIP.[17] *Id.* § 7410(k)(5).

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[17] The court of appeals suggested that EPA should have issued a SIP call under section 110(k)(5) here before imposing FIPs. *See* Pet. App. 47a-48a. But nothing in § 7410(c) makes a FIP conditional on a SIP call. *Compare* 42 U.S.C. § 7410(k)(5), *with id.* § 7410(c). Moreover, there must be a SIP or SIP provision in place for EPA to act under section 110(k)(5). *See Virginia*, 108 F.3d at 1410. Here, by contrast, nearly two dozen States did not submit any plans to address their good-neighbor obligations under the 2006 particulate-matter NAAQS. See *supra* at 12.

The States and localities supporting the decision below separately contended in the court of appeals that EPA was required to issue a SIP call because EPA had previously

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Outside the SIP procedures, the Clean Air Act contains other provisions that likewise expressly condition the States' statutory obligation on EPA's first defining the obligation. For example, before States must implement plans to improve visibility in national parks and wildlife areas, the statute requires EPA to "promulgate regulations" to "provide guidelines to the States . . . on appropriate techniques and methods." *Id.* § 7491(a)(4), (b)(1). The Act also directs EPA to "promulgate regulations establishing emission standards" for sources of hazardous air pollutants, *id.* § 7412(d), to aid States that are implementing plans addressing those pollutants, *see id.* § 7412(*l*)(2),(l)(5)(D).

The good-neighbor provision, by contrast, contains no similar "textual commitment of authority to the EPA," *Whitman*, 531 U.S. at 468. This Court presumes that Congress acts "intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another section of the same Act." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quotations marks omitted).

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approved some States' SIPs for the 1997 NAAQS under CAIR. *See* State and Local Pet'rs Opening Brief at 25, *EME Homer City Generation, L.P. v. EPA* (March 16, 2012) (D.C. Cir. No. 11-1302) (Doc. No. 1364206). The court of appeals did not address this issue (Pet. App. 48a-49a n.29) and it is not fairly raised by the questions on which this Court granted certiorari. In any event, EPA was not required to issue a SIP call before amending its previous approvals because the court of appeals had invalidated CAIR as inconsistent with the Clean Air Act. *See North Carolina*, 531 F.3d at 907-08. That invalidation gave EPA the authority to correct its erroneous prior SIP determinations, which assumed CAIR's validity, "without requiring any further submission from the State[s]," 42 U.S.C. § 7410(k)(6); *see* Pet. App. 173a-174a.

Because Congress did not direct EPA to promulgate regulations defining the States' good-neighbor obligations in advance, this Court should not read such a requirement into the Act.

B. Excusing States from Complying with Their Good-Neighbor Obligations Impedes Achievement of the Clean Air Act's Objectives.

In addition to being unmoored from the text of the Clean Air Act, the court of appeals' invention of a new federal prerequisite conflicts with the Act's coordinated strategy to promptly achieve air-quality standards that are essential to protecting public health and welfare.

The Clean Air Act coordinates the States' obligations along three axes. First, the Act addresses in-state and out-of-state effects together during the SIP process, reflecting Congress's intent to mount a comprehensive response to air-quality problems. *See* 42 U.S.C. § 7410(a)(2). Second, the Act sets defined deadlines for the SIP process, including the unambiguous requirement that a State address its good-neighbor obligations within three years of the setting or revision of a NAAQS, *id.* § 7410(a)(1), to ensure that measures will be in place to achieve or preserve attainment "as expeditiously as practicable," *id.* §§ 7502(a)(2), 7511(a)(1), 7513(c). See *supra* at 5-6. And third, the Act aligns the deadlines for establishing emissions controls (whether the pollution affects in-state or out-of-state areas) with the corresponding deadlines for a State to attain the NAAQS—thus ensuring that the means are in place to achieve the Act's ends. *See North Carolina*, 531 F.3d at 912.

The court of appeals' holding fragments this coordinated strategy. It applies different procedures to in-state and out-of-state pollution, forcing States to address piecemeal what Congress intended to be addressed together. It essentially ignores the statutory deadline for triggering good-neighbor protections, replacing the Act's clear three-year deadline with the open-ended contingency that EPA *might* promulgate a rule to define upwind States' good-neighbor obligations and the vague dictate that upwind States then implement that rule within a "reasonable time." Pet App. 47a; *see Union Elec. Co.*, 427 U.S. at 258 (noting that Congress adopted "stiff" deadlines for attaining NAAQS after rejecting a "reasonable time" standard).

Finally, by exempting only the good-neighbor provisions from the Clean Air Act's statutory deadlines, the court of appeals' holding requires downwind States to timely attain or preserve the NAAQS without any corresponding obligation on out-of-state sources to comply with the same timeline in addressing the pollution they send downwind. Because of this disparity, downwind States would be forced to meet their own statutory obligations in the first instance by mandating emissions reductions *only* from in-state sources, thereby expending enormous resources far in excess of what the Clean Air Act contemplates to offset emissions from upwind States.

For some States, even such draconian measures would not be enough, as demonstrated by the downwind areas that currently struggle to meet or maintain the ozone and particulate-matter NAAQS in the absence of adequate controls on out-of-state sources. See *supra* at 8 & n.6. The inability of these regions to attain or maintain those NAAQS results in increased illness, premature deaths, hospital

admissions, and lost work days for their residents. See *supra* at 9. The pollutants also contribute to degradation of the natural environment, including loss of vegetation and recurrent dead zones in water bodies that threaten entire aquatic ecosystems. See *supra* at 9.

Under the court of appeals' holding, these delays, and their associated environmental and public-health harms, will be endemic. The Clean Air Act requires EPA to review and, as necessary, revise the ozone and particulate-matter NAAQS every five years. 42 U.S.C. § 7409(d)(1). Any future rulemaking to address States' failures to meet their good-neighbor obligations for newly promulgated or revised NAAQS would be subject to the same delays that the court of appeals' new requirement has imposed for the 1997 and 2006 NAAQS. By condoning further inaction by upwind States, the court of appeals' holding thwarts efforts by downwind States to address the problems caused by these pollutants, contravening Congress's firm "mandate for the achievement of primary air quality standards," *Union Elec. Co.*, 427 U.S. at 259.

C. States Can and Do Independently Determine Their Good-Neighbor Obligations.

The court of appeals justified its engrafting of additional procedures to the Clean Air Act's carefully defined scheme on the ground that it is "impossible" for an upwind State to discern its good-neighbor obligations "until EPA defines the target." Pet. App. 50a. This reasoning rests on fundamental misconceptions of both the States' responsibilities under the Clean Air Act and their ability to study interstate air pollution.

The faulty premise at the heart of the court of appeals' reasoning is the assumption that the States' objective in preparing SIPs is to predict how EPA will interpret the Clean Air Act. According to the court below, good-neighbor obligations are "federally determined" by EPA, with the States' only role "to implement reductions required by EPA." Pet. App. 2a, 4a. Because EPA is charged with "quantif[ying] each State's good neighbor obligations," the court reasoned, it makes no sense to require each State first to "take its own stab in the dark" to guess what EPA will do. Pet. App. 56a, 58a.

This reasoning inverts the Clean Air Act's cooperative-federalism process. The Act's SIP provisions do not place the States in a passive role, reduced to merely implementing policies established by EPA. To the contrary, section 110(a)(2), which includes the good-neighbor provision, charges the *States* with responsibility for implementing SIP requirements in the first instance: the statute provides that "*[e]ach State* shall . . . adopt" a SIP and that each SIP "shall . . . contain adequate provisions" addressing out-of-state impacts. 42 U.S.C. § 7410(a)(1) & (a)(2)(D)(i) (emphasis added). The Act thus obligates state authorities to interpret and apply the statute's terms in the first instance—not to helplessly await EPA's interpretation. See *supra* at 18-21.

The States are well-equipped to exercise their independent obligation to study and implement their good-neighbor obligations. The Clean Air Act requires States to "provide for establishment and operation of appropriate devices, methods, systems, and procedures necessary to . . . monitor, compile, and analyze data on ambient air quality," *id.* § 7410(a)(2)(B)(i),

thereby expressly contemplating that States will have the capacity to monitor and model emissions and air quality. Those data are compiled and made publicly available, giving the States access not only to information about their own emissions and air quality, but also to data from upwind and downwind States.[18] States may take advantage of publicly available modeling software to analyze that data.[19] And the States have developed expertise by forming regional coalitions that regularly perform regional air-quality modeling for SIP development and other purposes, further facilitating States' understanding and analysis of cross-state air pollution. *See*, *e.g.*, 77 Fed. Reg. 45,992, 46,006 (Aug. 2, 2012) (modeling by regional state consortium); 77 Fed. Reg. 38,501, 38,506 (June 28, 2012) (modeling by coalition of States).

The States have also gained valuable experience under section 126 of the Act, 42 U.S.C. § 7426, a separate provision that gives States an alternative avenue to compel emissions reductions from upwind States. Under that provision, States may petition EPA for a finding that out-of-state sources are emitting air pollutants that significantly contribute to nonattainment or interfere with maintenance of a NAAQS in the petitioning State. *Id.* § 7426(b). To establish the basis for a petition, States perform their own air-pollution modeling of upwind sources—by necessity

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[18] *See* Pet. App. 198a; EPA, *2008 National Emissions Inventory: Data & Documentation*, www.epa.gov/ttn/chief/net/2008inventory.html.

[19] *See* Environ, *Download CAMx*, www.camx.com/download/default.aspx; *see also* Environ, *CAMx Applications in the U.S.*, www.camx.com/about/us-camx-applications.aspx.

without EPA's involvement—to compel EPA action.[20] *See, e.g.*, 76 Fed. Reg. 69,052, 69,057-58 (Nov. 7, 2011) (describing modeling performed by New Jersey in support of its petition).

Congress has recognized and relied on the States' ability to study and implement measures to control cross-state air pollution in related programs under the Clean Air Act. For example, in 1990, at the same time that it enacted the current form of the good-neighbor provision, Congress defined an ozone-transport region specifically to address the cross-state effects of ozone. 42 U.S.C. § 7511c. The ozone-transport statute, which presents another alternative and nonexclusive avenue for reducing interstate air pollution, relies on the States to "develop recommendations for additional control measures" in the first instance, with subsequent review by EPA. *Id.* § 7511c(c)(1), (4). As with the SIP provision, the

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[20] The court of appeals here paradoxically relied on section 126 to *support* its conclusion that EPA lacked authority to implement the States' good-neighbor obligations in a FIP, reasoning that EPA's ability to implement good-neighbor obligations through section 126 implicitly displaced any such authority through the FIP process. *See* Pet. App. 55a. But this reasoning ignores the two procedures' complementary nature. The FIP process requires EPA to implement good-neighbor protections when it has found that an upwind State failed to do so. Section 126, by contrast, gives downwind States a remedy if EPA fails to perform this function, authorizing States "to force the hand of the EPA" to address upwind air pollution. *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1042 (D.C. Cir. 2001). In other words, the FIP process gives EPA a remedy if States fail to act; section 126 gives States a remedy if EPA fails to act. There is no indication that Congress intended to allow only one of these complementary remedies to address the States' good-neighbor obligations.

ozone-transport statute reflects Congress's understanding that "States have taken the lead in environmental protection in general and in particular in putting together solutions that deal with some of the regional pollution problems." 4 *Legislative History of the Clean Air Act Amendments of 1990*, *supra*, at 5077 (comment of Sen. Lieberman).

Thus, contrary to the court of appeals' reasoning, it is far from "impossible" (Pet. App. 50a) for a State to independently study the effects of its air pollution on downwind States and to determine, without EPA's input, its good-neighbor obligations with respect to that pollution, either on its own or in conjunction with other States. Nor are the States' efforts to determine their own good-neighbor obligations "bound to fail." Pet. App. 60a. Indeed, with respect to the very NAAQS that are at issue here, Delaware and Colorado conducted the obligatory evaluation of their good-neighbor obligations, and EPA approved their SIP submissions. *See* 76 Fed. Reg. 53,638; 77 Fed. Reg. 1,027; 75 Fed. Reg. 31,306. Nothing prevents other States from pursuing the same path.

To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution. But such disagreement is not a sign of dysfunction—Congress expressly authorized EPA to reject the States' SIP submissions in appropriate circumstances. 42 U.S.C. § 7410(c); *cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489-90 (2004) (agreeing that EPA has "authority to guard against unreasonable [best available control technology] designations"). Indeed, disagreement is an inevitable feature of any oversight scheme in which

Congress directs a federal agency to independently review States' implementation of a federal law. *See, e.g., Pharm. Research & Mfrs. of Am. v. Thompson*, 362 F.3d 817, 822 (D.C. Cir. 2004) (federal review of state Medicaid plans); *Envtl. Improvement Div. of the N.M. Health & Env't Dep't v. Marshall*, 661 F.2d 860, 862-63 (10th Cir. 1981) (federal review of state occupational-safety-and-health plans); *Miss. Comm'n on Natural Res. v. Costle*, 625 F.2d 1269, 1275-76 (5th Cir. 1980) (federal review of state water-quality standards). The court of appeals' error was to construe this disagreement not as the end of a prescribed review process, but instead as the beginning of a wholly new administrative process subject to judicially created procedures and deadlines found nowhere in the Clean Air Act.

Notwithstanding EPA's review authority, nothing in the statute forbids EPA from voluntarily providing guidance before the States submit SIPs, engaging in ongoing dialogue with the States before issuing FIPs, or accepting state input after FIPs are proposed. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 687 (D.C. Cir. 2000) (approving of EPA's issuance of prospective guidance regarding the good-neighbor provision). EPA in fact did all of these with the Transport Rule. For example, the particular threshold that EPA adopted to determine if an upwind State contributes significantly to a downwind State's air-pollution problems was suggested by a group of States that collaborated to analyze the issue. See *supra* at 13 & n.13; *see also* 77 Fed. Reg. at 1,029 (noting that during the SIP-review process Colorado submitted revised regulations to address concerns expressed by EPA); 76 Fed. Reg. 43,128, 43,131 (July 20, 2011) (referencing multiple avenues of communication with

EPA open to Alabama in developing its SIP). And in many cases, particularly for complex matters, it may be better policy for EPA to collaborate closely with the States both before and after the expiration of the Clean Air Act's three-year SIP deadline and two-year FIP deadline.

But the question in this case is not whether EPA *can* or *should* provide such guidance, but whether it *must* do so before the States have any duty to implement their SIP obligations—including the statutory requirement that they act as good neighbors. The plain language of the Clean Air Act belies any interpretation that would read into the statute such an additional federal prerequisite to state action.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

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IN THE

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE STATES OF NEW YORK, CONNECTICUT, DELAWARE, ILLINOIS, MARYLAND, MASSACHUSETTS, NORTH CAROLINA, RHODE ISLAND, VERMONT, AND THE DISTRICT OF COLUMBIA, AND THE CITIES OF BALTIMORE, BRIDGEPORT, CHICAGO, NEW YORK, AND PHILADELPHIA AS RESPONDENTS IN SUPPORT OF PETITIONERS

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INTRODUCTION

The Clean Air Act is unambiguous: States must adopt state implementation plans (SIPs) within three years of the promulgation or revision of a national ambient air quality standard (NAAQS); those SIPs must address States' good-neighbor obligations to limit the effects of their pollution on downwind States; and if the SIPs are inadequate, EPA must issue federal implementation plans (FIPs) that satisfy the States' obligations.

Ignoring the Clean Air Act's plain language, State and Local Respondents argue that the Act's good-neighbor provision does not apply to States at all until EPA tells them what that provision means by quantifying emissions reductions. But States can and do interpret federal laws, including the Clean Air Act, without such specific agency guidance. And they can and do calculate for themselves the emissions reductions necessary to meet their obligations under the Act.

The good-neighbor provision is no exception. Congress intended States to rely on their own judgment and expertise to adopt state implementation plans that address the effects of their downwind pollution. The Act thus carves out a three-year window of state autonomy to formulate and adopt such plans, and limits EPA's ability to overturn the States' policy judgments. At the same time, Congress empowered EPA to step in with its own implementation plan at the end of those three years if state efforts are inadequate, providing a federal backstop to ensure that state inaction will not delay attainment of air-quality standards. The structure of the statute thus gives States a choice between taking

the lead in regulating cross-state emissions or accepting the consequences of EPA's implementation of a FIP.

Respondents' position ignores this careful sequencing of state and federal responsibilities, giving EPA the initial authority to dictate emissions reductions rather than leaving States the opportunity to regulate cross-state emissions themselves. And Respondents' position further ignores the Clean Air Act's carefully defined deadlines, delaying implementation of pollution controls in upwind States while downwind States suffer the consequences. The plain language of the Act refutes Respondents' attempts to so rewrite the coordinated responsibilities of the States and EPA to limit interstate air pollution.

ARGUMENT

I. Nothing in the Clean Air Act's SIP Provisions Requires EPA to Quantify States' Good-Neighbor Obligations.

The Clean Air Act defines a straightforward process to timely implement the NAAQS: the Act gives States the initial opportunity to design and adopt measures to achieve those standards, and provides a federal backstop if the States' own measures prove inadequate. Br. of the States & Cities as Resps. in Support of Pets. (States' Opening Br.) 3-6, 18-22. Ignoring the Act's expressly defined procedures, Respondents posit an additional quantification step for EPA that appears nowhere in

the statute. Respondents assert that States have no responsibility to submit SIPs addressing the downwind effects of their air pollution until "*after* EPA has quantified the States' good-neighbor obligations" by "telling the States *how much* contribution to another State's air pollution would be deemed 'significant'" under the good-neighbor provision. Brief for the State and Local Respondents (Tex. Br.) 20, 39. And Respondents also assert that EPA may not issue FIPs, even after finding that a State did not address its good-neighbor obligations, until EPA waits a further "reasonable time period" for States to submit SIPs that satisfy EPA's quantifications. *Id.* at 56.

The plain language of the Clean Air Act forecloses Respondents' interpretation. The Act's sole trigger for the States' SIP obligations, including their responsibility to prohibit emissions that "contribute significantly to nonattainment [of a NAAQS] in . . . any other State," 42 U.S.C. § 7410(a)(2)(d), is EPA's promulgation or revision of that NAAQS, *not* EPA's quantification of the term "contribute significantly," *id.* § 7410(a)(1). Indeed, nothing in § 7410 requires EPA to act at all with respect to the States' good-neighbor obligations—let alone provide a specific number quantifying those obligations—before States must submit SIPs addressing a new or revised NAAQS.

Likewise, nothing in the Act delays EPA's FIP authority beyond the three years that Congress reserved for States to adopt their own SIPs. Once EPA disapproves a State's SIP submission, or finds that a State has failed to make a required SIP submission, it is authorized to issue a FIP "*at any*

time within 2 years" of the disapproval or finding. *Id.* § 7410(c)(1) (emphasis added). There is no textual support for Respondents' assertion that EPA must delay issuing a FIP for an additional and wholly undefined "reasonable time period" (Tex. Br. 56) after the three-year SIP deadline has expired, simply because the FIP addresses a State's good-neighbor obligations.

Respondents' interpretation also conflicts with the Act's plain language because it would subject only good-neighbor obligations to an EPA-quantification prerequisite. The structure of § 7410 does not support such unique treatment of this one aspect of States' SIP responsibilities. The good-neighbor provision is just one of thirteen substantive SIP requirements that must all be satisfied within three years of EPA's promulgation or revision of a NAAQS. *See* 42 U.S.C. § 7410(a)(2)(D). Nothing in the text of § 7410 delays a State's SIP responsibilities or EPA's FIP authority on the ground that a State's good-neighbor obligations do not arise until they are first quantified.

II. States Can and Do Determine Their Good-Neighbor Obligations Without EPA's Advance Quantification.

A. States Can Independently Interpret the Good-Neighbor Provision.

Lacking any textual support to counter a straightforward reading of § 7410(a)(2) as requiring States to address their good-neighbor obligations before EPA quantifies them, Respondents instead

assert that States cannot possibly "predict how EPA will interpret [the good-neighbor provision] before EPA announces its authoritative construction of that statute." Tex. Br. 49. That argument betrays a fundamental misunderstanding of the States' responsibilities under the Act.

1. Contrary to Respondents' assertions (*id.*), States are not required to "predict" how EPA will interpret the Act because their obligations under the Act are not synonymous with EPA's interpretation of those obligations. Instead, Congress gave States independent authority to determine and implement their federal duties. By providing a three-year window for States to formulate and adopt SIPs, Congress reserved for States the initial opportunity to select pollution controls that satisfy the Act's requirements. And States' decisions within this window are controlling: EPA has "*no authority* to question the wisdom of a State's choices" so long as a State's preferred pollution controls lead to attainment or maintenance of the relevant NAAQS. *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) (emphasis added). Respondents never square their EPA-first position with *Train*'s recognition that States can submit their SIPs without any prior assistance from EPA at all.

Respondents instead argue that the good-neighbor provision is exempt from the SIP process's State-first approach because the phrase "contribute significantly" is ambiguous, and EPA's authority to construe ambiguous statutory language under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), means that the

States "cannot decide the legal meaning of 'significant[]' contribution" themselves. Tex. Br. 52. But the fact that a *court* may not second-guess EPA's reasonable interpretation of an ambiguous statutory term does not mean that *States* have no role in construing the statute. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 411-12 (1999) (Thomas, J., concurring in part and dissenting in part) (finding no "principle of federal law that prohibits the States from interpreting and applying federal law").

To the contrary, this Court has repeatedly recognized that States play a crucial role in interpreting federal law under cooperative-federalism programs, and that there is "a range of permissible choices [available] to the States" when they do so. *Wis. Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 495 (2002) (upholding Wisconsin's interpretation of "spousal impoverishment" provisions of Medicare Catastrophic Coverage Act of 1988). Indeed, States have long interpreted ambiguous language in the Clean Air Act without waiting for EPA to tell them what that language means. Many of the provisions describing States' SIP responsibilities use terms that may be subject to agency interpretation.[1] Yet States regularly submit SIPs

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[1] *See, e.g.*, 42 U.S.C. § 7410(a)(2)(A) (requiring "necessary" or "appropriate" emissions limitations); *id.* § 7410(a)(2)(E) (requiring States to demonstrate "adequate" resources to implement SIP); *id.* § 7410(a)(2)(L)(i) (requiring States to charge "reasonable costs" for permit applications).

reflecting their own reading of those terms[2]—including the language in the good-neighbor provision. See *infra* at 11-13. Congress's decision not to require EPA to provide advance guidance on this language, while expressly requiring that EPA do so elsewhere in the Act (*see* States' Opening Br. 25-26), confirms that it expected States to interpret for themselves their statutory SIP obligations.

Under Respondents' position, by contrast, States would be helpless in the face of ambiguous language in the Act until instructed by EPA. And that helplessness would extend not only to the States' good-neighbor obligations but also to their other ambiguously defined SIP responsibilities. Such a regime would vastly expand the time it takes for essential air pollution controls to be put in place, undermining Congress's clear directive for prompt implementation in accordance with the Act's interlocking deadlines. *See id.* at 27-28. And it would run counter to Congress's explicit direction that States—not EPA—have the first opportunity to make the policy judgments necessary to formulate a SIP, rather than being "consign[ed]" to the "ministerial tasks" of implementing federally defined policies. *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 518 (2004) (Kennedy, J., dissenting).

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[2] *See, e.g., N.Y. State Implementation Plan for the Infrastructure Assessment for Ozone Under Sections 110(A)(1) and (2) of the Clean Air Act* 22-23 (March 2013), *available at* http://www.dec.ny.gov/chemical/94349.html (interpreting the term "reasonable costs" and determining which political subdivisions are "affected" by the plan).

2. Although the States have initial responsibility to determine and implement their SIP obligations, Congress gave EPA express authority to review SIPs and to supply its own approach when States do not adequately address their SIP responsibilities on their own. Such review authority is a feature of nearly every cooperative-federalism program. *See* States' Opening Br. 33-34. Respondents nonetheless assert that the unsurprising fact of federal review makes the States' initial responsibility to submit good-neighbor SIPs "a fool's errand" because EPA might disagree with the States' assessments. Tex. Br. 40.

But EPA's review capacity does not make the States' initial policy decisions meaningless, whether here or in any of the other cooperative-federalism programs that federal agencies oversee. For one thing, the Clean Air Act expressly cabins EPA's authority, thus preventing EPA from exercising "unlimited" power to implement any FIP of its choosing regarding any pollutant. *See id.* at 45. A FIP is limited to addressing only "attainment of the relevant [NAAQS]," 42 U.S.C. § 7602(y)—*i.e.*, the pollutant-specific air-quality standard that triggered the States' initial SIP responsibilities.[3] A FIP may overrule a State's SIP submission only to the extent that the SIP fails to provide for timely attainment or

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[3] Contrary to Respondents' claims, this limitation prevents EPA from issuing FIPs that "impose[] requirements that have nothing to do with the Clean Air Act or the NAAQS" (Tex. Br. 45), or that attempt to implement "an entirely new NAAQS" announced for the first time in a FIP (*id.* at 46; *see also id.* at 38, 43; W. Va. Amicus Br. 3-4).

maintenance of the relevant NAAQS, and not, for example, solely because the State failed to adopt particular control measures that EPA favors. *Train*, 421 U.S. at 79; *see Texas v. EPA*, 690 F.3d 670, 684 (5th Cir. 2012). And EPA's disapproval of a SIP remains subject to the ordinary constraints on federal administrative action, including judicial review to determine whether the agency's decision was arbitrary or capricious. *See, e.g.*, *Oklahoma v. EPA*, 723 F.3d 1201, 1211 (10th Cir. 2013).

Even when EPA properly disapproves a SIP, that outcome does not make the State's initial submission pointless. For example, EPA may approve a SIP submission in part or on condition that the State make certain revisions, thus retaining the state policy choices that are reflected in the approved portion of the SIP. 42 U.S.C. § 7410(k)(3)-(4); *see* 73 Fed. Reg. 21,418, 21,437 (Apr. 21, 2008) (noting that EPA's partial disapproval of a SIP preserved "various source-specific emission limits" that Montana had adopted). Moreover, EPA's initial decision to disapprove a SIP is not necessarily the final word: a State may "correct[] the deficiency" that formed the basis of the disapproval at any time before EPA promulgates a FIP, 42 U.S.C. § 7410(c)(1); or it may submit additional materials to persuade EPA that its SIP is adequate, as Delaware did prior to the final Transport Rule. *See* 76 Fed. Reg. 53,638 (Aug. 29, 2011); 76 Fed. Reg. 2,853, 2,855 (Jan. 18, 2011); see also *infra* at 12. Even if EPA wholly disagrees with a State's approach and cannot be persuaded otherwise, the State's SIP submission will at the very least require EPA to carefully consider the State's policy

judgments and provide a "reasoned explanation" for rejecting them. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007). The need to provide such an explanation—and have it survive judicial review—is itself a meaningful constraint on EPA's review authority.[4]

B. States Are Capable of Studying and Addressing the Effects of Regional Cross-State Air Pollution.

Respondents and their *amici* separately argue that the States are incapable of quantifying their

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[4] As evidence that only EPA may interpret the good-neighbor provision, Respondents cite statements by EPA responding to unrelated comments in past rulemakings construing the provision. Tex. Br. 6, 53. But an agency's statements cannot change the meaning of unambiguous statutory language, *see MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), and here, Congress expressly directed States to determine and implement their SIP obligations in the first instance. See *supra* at 3-4. Moreover, EPA has repeatedly confirmed its view that the good-neighbor provision "places the primary responsibility" on upwind States to limit downwind emissions. 64 Fed. Reg. 28,250, 28,264 (May 25, 1999); *see also* 76 Fed. Reg. 19,662, 19,667 (Apr. 7, 2011); 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998).

In fact, in the sections of the NOx SIP Call and Clean Air Interstate Rule (CAIR) SIP Call that Respondents cite (Tex. Br. 6-7, 9), EPA confirmed that it expects States to address interstate transport in their SIPs under the Act. *See* 70 Fed. Reg. 25,162, 25,265 (May 12, 2005); 63 Fed. Reg. at 57,367-70. To the extent that EPA asserted authority to quantify States' good-neighbor obligations, it did so after States had failed to make initial submissions during the statutory three-year window, thereby triggering EPA's authority to weigh in.

significant contributions to downwind air-pollution problems due to the unique difficulties of analyzing and coordinating a response to the effects of regional pollutants such as ozone and fine particulate matter. *See, e.g.*, Tex. Br. 41; Br. of *Amici Curiae* State of West Virginia et al. in Support of Resps. (W. Va. Amicus Br.) 3, 10-27. But States *have* been able to address regional pollution independently of EPA. And even if Respondents were correct that regional pollutants pose unique difficulties, that argument would not justify rewriting the good-neighbor provision.

1. States have determined their good-neighbor obligations with respect to regional pollutants in a variety of contexts without prior EPA quantification. Contrary to Respondents' assertion that "Delaware's experience illustrates the problems" that arise when States attempt to "figure out their good-neighbor obligations on their own" (Tex. Br. 40-41, 49), Delaware in fact *successfully* determined and then satisfied its good-neighbor obligations with respect to the NAAQS at issue here, *see* 76 Fed. Reg. at 2,855-56. In 2009, Delaware submitted a good-neighbor SIP demonstrating that it had made the emissions reductions necessary to prevent its significant contributions to other States' nonattainment of the daily particulate-matter NAAQS. *Id.* at 2,856. When EPA nonetheless proposed to subject Delaware to the Transport Rule's distinct set of emissions reductions, Delaware objected, backing up its own analysis with "comprehensive documentation" and a "thorough explanation" of the differences between its approach and EPA's. *Id.* at 2,855. EPA ultimately agreed that

Delaware's own emissions reductions satisfied its good-neighbor obligations, approving Delaware's SIP and excluding Delaware from the final Transport Rule. 76 Fed. Reg. 53,638; *see* States' Opening Br. 14-15.

Delaware is not the only State that has successfully analyzed and satisfied its good-neighbor obligations. EPA has also approved SIPs from several States outside of the regions covered by the Clean Air Interstate Rule (CAIR) and the Transport Rule (such as Colorado, Idaho, North Dakota, New Mexico, and Oregon) after those States independently evaluated their good-neighbor obligations and determined that they did not significantly contribute to downwind air-quality problems due to their chosen pollution controls and other factors. Although these States could consult EPA's modeling in the Transport Rule and elsewhere in preparing their SIPs, they did not wait for EPA to tell them how much to reduce their cross-state air pollution. *See* 78 Fed. Reg. 45,457, 45,458 (July 29, 2013) (North Dakota); 78 Fed. Reg. 15,664, 15,667 (Mar. 12, 2013) (New Mexico) 76 Fed. Reg. 80,747, 80,748 (Dec. 27, 2011) (Oregon); 75 Fed. Reg. 72,705,72,707 (Nov. 26, 2010) (Idaho); *see also* States' Opening Br. 33 (discussing Colorado's SIP submission).

2. The mere fact that "cross-state air pollution is a multi-state issue" does not render States helpless to address the problem, as Respondents' *amici* contend. W. Va. Amicus Br. 9 (emphasis omitted); *see also* Tex. Br. 51. States have considerable experience modeling regional transport of air pollution and devising

regional approaches to address it, both in conjunction with other States and on their own.[5] For example, the eight-state Northeast States for Coordinated Air Use Management group collaborated to implement consistent state regulations governing gasoline volatility. *See* S. Rep. No. 101-228, at 51 (1989). And the twelve-state (plus the District of Columbia) Ozone Transport Commission (OTC) recently prepared multiple model air-quality rules for state-by-state adoption to reduce the polluting effects of consumer products, architectural coatings, and portable fuel containers.[6]

EPA often relies on such multistate collaborations when conducting its own rulemaking. For example, the "air quality modeling and recommendations" of the Ozone Transport Assessment Group—a consortium that included the thirteen OTC members and twenty-five States from the South and Midwest—"formed the basis for" the NOx SIP Call. 63 Fed. Reg. at 57,361. And the Transport Rule itself relies on a numerical inclusion threshold that was proposed by the OTC. *See* States' Opening Br. 13.

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[5] *See, e.g.*, 75 Fed. Reg. 55,494, 55,500 (Sept. 23, 2010) (noting information from Western Regional Air Partnership Technical Support System); 71 Fed. Reg. 25,328, 25,334 (Apr. 28, 2006) (noting transport study results from Southern Appalachian Mountains Initiative); 63 Fed. Reg. 56,292, 56,296 (Oct. 21, 1998) (noting transport study results from Northeast States for Coordinated Air Use Management).

[6] Ozone Transport Commission, Model Rules, *at* http://www.otcair.org/document.asp?fview=modelrules.

The section 126 proceedings that prompted EPA's prior interstate-transport rules provide further evidence that States can analyze and devise solutions for regional air-pollution problems without EPA's involvement. *See id.* at 31-32. The state petitions preceding the NOx SIP Call explicitly identified source categories and geographic areas to be regulated and demanded specific emissions limitations formulated by the petitioning States based on their own research and analyses. 64 Fed. Reg. at 28,254; 63 Fed. Reg. at 56,296. And North Carolina's section 126 petition, which sought to expedite the pollution controls that EPA had proposed in CAIR, relied not just on EPA's proposed CAIR modeling but also on extensive transport research from a regional coalition and North Carolina's own independent analyses. 71 Fed. Reg. at 25,334, 25,336. Thus, contrary to the assertions of Respondents' *amici*, it is far from "impossible for the States to quantify cross-state air pollution for regional pollutants." W. Va. Amicus Br. 3.

3. Even if Respondents and their *amici* were correct that the States are categorically unable to respond as a group to regional pollutants without federal help, that asserted fact would still not dictate rewriting the good-neighbor provision to add Respondents' EPA-quantification step. Section 7410(c)(1) authorizes EPA to issue a FIP to ensure that adequate pollution controls are in place regardless of the reason for a State's failure to submit an adequate SIP—whether an honest mistake in assessing the State's good-neighbor obligations, perceived resource constraints, difficulty coordinating with neighboring States, or any other reason. Nothing

in the statute makes the practical difficulties a State may face a basis for suspending the States' good-neighbor obligations or EPA's FIP authority. Indeed, Congress was well aware of the complexity of the interstate-transport problem when it amended the Clean Air Act in 1990 to define an ozone-transport region. *See* States' Opening Br. 32. Yet instead of requiring EPA to quantify the States' good-neighbor obligations in advance, Congress chose instead to *increase* the States' responsibilities to limit downwind air pollution and rejected an amendment that would have loosened the mandatory requirement that EPA issue a FIP within two years of disapproval. *See id.* at 7, 22.

Moreover, the narrow reasons that Respondents and their *amici* give for being unable to address cross-state air pollution do not justify the broad revision of SIP procedures that they demand. Respondents and their *amici* do not contend that *all* cross-state air pollution is too complex for States to collectively analyze and reduce. Instead, they primarily cite the unique difficulties of the Transport Rule, emphasizing the size of the region that the rule encompasses and the regional effects of the specific pollutants it covers. *See* Tex. Br. 3, 52; UARG Br. 22; W. Va. Amicus Br. 3, 17. But the good-neighbor provision also applies to the more straightforward effects of localized pollution "caused by emissions from a nearby source or a discrete group of nearby sources." Tex. Br. 3. Respondents and their *amici* cannot dispute that emissions reductions to address these simpler cross-state pollution problems can be initially quantified by States. *See, e.g.*, 76 Fed. Reg.

69,052, 69,057-59 (Nov. 7, 2011) (approving New Jersey's section 126 petition regarding pollution from a power plant in Pennsylvania). And regional groups have successfully agreed on emissions reductions to resolve more complex regional pollution problems as well. W. Va. Amicus Br. 17 (noting successful regional collaborations involving up to fifteen States). See *supra* at 13-14. Even if the problem addressed by the Transport Rule posed unusual challenges to States attempting to act on their own, such challenges would not justify rewriting statutory SIP procedures that apply to a broader class of cross-state pollution problems.

Respondents' *amici* claim that States have neither the resources nor the time to address regional cross-state air pollution on their own. W. Va. Amicus Br. at 19-26. But a State that chooses to devote, for example, only four employees and a few hundred thousand dollars for SIP planning (*id.* at 21) is limited in its ability to participate in the planning process by its own choice, and not by the action of EPA. And while *amici* point to many purported obstacles to timely action by the States, including data collection, modeling, development of a plan, and adoption of SIPs by their own frequently part-time legislatures, W. Va. Amicus Br. 23-25, *amici* do not explain how adding a step for EPA quantification would make it any easier for the States to comply with their three-year SIP submission deadline. Even under the regime they propose, it would still be necessary for the States to collect data, for that data to be used in modeling, and for States to develop and adopt SIPs. The addition of another step would do

little to alleviate most of those problems. The Act imposes short timelines in order to ensure expeditious action to control the effects of identified air pollutants. The unwillingness of a few States to devote the resources necessary to timely comply with their good-neighbor obligations does not justify relieving those States or any others of that unambiguous statutory duty.

C. Respondents' EPA-First Interpretation Undermines the States' Authority Under the Clean Air Act.

Respondents assert that inserting an EPA-quantification step into the Act's carefully defined SIP procedures protects the "statutory prerogatives that the Clean Air Act preserves for the States." Tex. Br. 56. But precisely the opposite is true.

Under Respondents' view, EPA must define the States' good-neighbor obligations in the first instance, depriving upwind States of any opportunity to determine for themselves the necessary level of emissions reductions. Respondents propose no statutory deadline for EPA to issue its quantifications, nor does the Act mention any. Upwind States would thus be expected to wait (perhaps indefinitely) for EPA to quantify specific emissions reductions before adopting SIPs, and their role would be limited to "implement[ing] EPA-announced good-neighbor obligations." Tex. Br. 60. During this period of delay, downwind States would remain subject to the Act's strict deadlines for attaining or maintaining the NAAQS, and their citizens' health would remain in jeopardy. Downwind States have already spent

billions of dollars to achieve additional in-state reductions in an attempt to compensate for upwind pollution—and often even those extraordinary efforts are not enough. States' Opening Br. 8-9 & n.6, 28-29.[7]

By contrast, the State-first interpretation of § 7410 that this Court endorsed in *Train* preserves the States' initial policymaking authority under the good-neighbor provision without disrupting the Act's coordinated deadlines for timely addressing cross-state pollution. States thus retain the option to forestall EPA regulation by first adopting their own measures to limit the downwind effects of their air pollution. Of course, States might decline to comply with the Act and accept the consequences of a FIP defining their good-neighbor obligations. But even then they can meaningfully affect the content of "EPA-announced good-neighbor obligations" (Tex. Br. 60).

First, States retain a significant role in regional coalitions that have historically influenced EPA's cross-state transport rules and related FIPs. See *supra* at 14. Second, a State that fails to submit a SIP within the three-year deadline may still do so later after EPA proposes to issue a FIP but before the FIP becomes final. Third, States can submit comments regarding the specific emissions reductions that EPA proposes in the FIP, including the allocation of those

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[7] *See also* C.A. App. 928 (noting that to comply with the Act, New York has required NOx reductions at ten times the cost threshold imposed by the Transport Rule).

reductions among sources within the State.[8] These options provide States with a meaningful opportunity to ensure that regulation in this area satisfies their interests. Indeed, despite objecting to EPA's FIPs, Respondents tellingly do not point to a single policy choice that they would have made differently. *See* Tex. Br. 20, 56.

Thus, the approach to § 7410 endorsed in *Train* preserves the States' option to act first to address their good-neighbor obligations without waiting for EPA's assistance, or to accept instead the consequences of EPA's issuance of a FIP. Respondents' position, by contrast, forecloses the States' option to act first, requiring them to play second fiddle to EPA even when they would prefer to chart their own course. It is that result, and not EPA's approach to the Transport Rule, that undermines the States' prerogatives under the Act.

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[8] More than three dozen States, including Respondents and their *amici*, submitted comments to EPA regarding the Transport Rule, its associated FIPs, and the data underlying the rule. *See, e.g.*, Pet App. 199a (updating the source inventory based on comments); *id.* at 219a (updating final modeling and data based on comments); *id.* at 210a (updating emissions data for Nebraska based on comments); W. Va. Amicus Br. 14. The States' numerous comments on the proposed Transport Rule and EPA's announcement of proposed FIPs well in advance of its issuance of the final plans, 75 Fed. Reg. 45,210, 45,299 (Aug. 2, 2010), belie Respondents' assertion that "[m]any upwind States had no idea that they needed to undertake any pollution-mitigation efforts" until the Transport Rule was finalized. Tex. Br. 13.

III. EPA Is Not Required to Delay Issuing a FIP When a State Fails to Address Its Good-Neighbor Obligations.

In addition to challenging the States' obligation to independently address their good-neighbor obligations within three years of the promulgation or revision of a NAAQS, Respondents also assert that EPA must delay issuing FIPs until some undefined period of time after it first quantifies the States' good-neighbor obligations. But Respondents' attempts to find support for such a delay are unavailing.

1. Respondents assert that the States' ability to "correct[] the deficiency" that led to EPA's disapproval of a SIP or finding of no submission, 42 U.S.C. § 7410(c)(1), mandates a waiting period between EPA's disapproval or finding and any resulting FIP. Tex. Br. 47-48. But while the statute invites States to correct deficiencies, it does not require EPA to wait for such correction. To the contrary, the statute expressly authorizes EPA to issue a FIP "at any time" after a disapproval or finding of no submission. 42 U.S.C. § 7410(c)(1).

Respondents complain that this authorization of immediate federal action makes the States' "opportunity to correct" a "meaningless gesture" (Tex. Br. 47), but that is simply not so. Because the Act gives EPA up to two years to issue a FIP after a disapproval or finding of no submission, *see* 42 U.S.C. § 7410(c)(1), as a practical matter States often do have time to correct their submissions. Here, for example, more than a year elapsed after EPA found that States had failed to submit SIPs regarding the 2006 particulate-

matter NAAQS before EPA issued the Transport Rule's FIPs. *See* States' Opening Br. 12-13.

At the same time, the requirement that EPA act within a specified time period helps to maintain the Act's strict timetable for downwind States to achieve the NAAQS. *See id.* at 27-28. Nothing in the Act justifies a court disrupting this balance by giving upwind States more time than the Act provides to correct deficiencies in their SIPs. *See Union Elec. Co. v. EPA*, 427 U.S. 246, 259 (1976).

2. Respondents concede that EPA was authorized and required to issue FIPs under § 7410(c)(1) as a result of its disapprovals and findings that States failed to submit SIPs. They assert, however, that EPA could issue only FIPs that implemented its "previously announced good-neighbor requirements"; FIPs implementing EPA's more recent assessments of good-neighbor obligations had to wait. Tex. Br. 19-20; *see also id.* at 61. But § 7410(c)(1) imposes no such limitation. Once the statutory prerequisites for a FIP have been satisfied (and Respondents acknowledge that they are satisfied here, *see* Tex. Br. 19), EPA is required to promulgate a plan that fully implements "enforceable emission limitations or other control measures, means or techniques" that will "provide[] for attainment of the relevant [NAAQS]." 42 U.S.C. § 7602(y). In other words, EPA must make the policy and technical determinations that the defaulting State should have made to address the State's SIP responsibilities, including its good-neighbor obligations. *See Cent. Az. Water Conservation Dist. v. EPA*, 990 F.2d 1531, 1541 (9th Cir. 1993) (EPA "stands in the shoes of the defaulting

State, and all of the rights and duties that would otherwise fall to the State accrue instead to EPA" (quotation marks omitted)); States' Opening Br. 21-22.

Nothing in the Act limits EPA to implementing old emissions targets when it issues a FIP, as Respondents contend. Such a limitation would preclude EPA from issuing a FIP altogether when the agency seeks to address a new NAAQS that was promulgated without any prior rulemaking that could supply preexisting emissions targets to attain or maintain that NAAQS. But even Respondents concede that such a result would violate the plain language of § 7410(c)(1), which (as they acknowledge) requires EPA to issue *some* sort of FIP to address the relevant NAAQS upon a SIP disapproval or finding of failure to submit. Tex. Br. 19-21. When prior emissions targets exist, Respondents' position would force EPA to implement pollution controls based on those possibly outdated assessments of the necessary measures to attain or maintain the relevant NAAQS—or, worse, require EPA to rely on a methodology that a court has declared illegal.[9] *See* Tex. Br. 61 (suggesting that EPA should have "imposed good-neighbor FIPs based on CAIR"). Nothing in the plain language of § 7410 or its

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[9] The court of appeals permitted CAIR to remain in effect notwithstanding its decision in *North Carolina*, but only until CAIR was "replaced by a rule consistent with [the court's] opinion." *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008) (per curiam).

legislative history suggests that Congress intended such perverse results.

3. Respondents contend that the FIPs for the two 1997 NAAQS were invalid because EPA had previously approved good-neighbor SIPs for those NAAQS under CAIR, and EPA had no authority to revoke that approval without giving States a further opportunity to amend their earlier SIPs. Tex. Br. 25-26. But the Act expressly authorizes EPA to "revise" an earlier SIP approval "without requiring any further submission from the State" if EPA determines that its prior approval "was in error." 42 U.S.C. § 7410(k)(6). And the court of appeals' invalidation of CAIR in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008) (per curiam), provided an adequate basis for EPA to determine that it should not have approved the States' CAIR-based SIPs. *See* States' Opening Br. 25, n.17.

Respondents assert (Tex. Br. 29-31) that EPA was required to revoke its approval of the CAIR SIPs under the SIP-call provision of § 7410(k)(5), rather than the error-correction provision of § 7410(k)(6), but that argument fundamentally misunderstands the effect of a judicial decision finding that an agency's rule violates federal law. When a court interprets federal law, it declares "what the law *was*," not merely how the law should be applied going forward. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 221 (1988) (Scalia, J., concurring) (emphasis added). Thus, when the court of appeals concluded in *North Carolina* that CAIR violated the Act, it effectively held that compliance with CAIR had *never* satisfied the States' good-neighbor obligations,

including when EPA approved the States' CAIR-based SIPs. Because EPA may approve a SIP only to the extent that it "meets all of the applicable requirements" of the Act, 42 U.S.C. § 7410(k)(3), the court of appeals' decision removed *ab initio* the premise on which EPA's SIP approvals had been based, thereby authorizing EPA to determine that its earlier approvals had been "in error" and required correction under § 7410(k)(6).

Rather than squarely confronting the effect of a judicial decision interpreting federal law, Respondents instead repeatedly invoke the specter of EPA "chang[ing] its interpretation of the good-neighbor requirements" as a basis to revoke previously approved SIPs under § 7410(k)(6). Tex. Br. 29; *see also id.* at 30-32, 36. But that is not what happened here. EPA's invocation of § 7410(k)(6) was not a response to a unilateral change in its own interpretation of the good-neighbor provision, nor did it reflect an attempt by EPA to retroactively "alter[] the past legal consequences of past actions," *Georgetown Univ.*, 488 U.S. at 219 (Scalia, J., concurring). Instead, EPA complied with a judicial decision declaring its previous interpretation illegal from its inception.

* * *

Respondents' misinterpretation of the good-neighbor provision and their proposed limits on EPA's FIP authority threaten to delay, for many more years, the relief from upwind air pollution that downwind States have long needed to ensure that air quality for their own citizens reaches standards that

EPA has found "*requisite* to protect the public health," 42 U.S.C. § 7409(b)(1) (emphasis added). Respondents' position would essentially grant upwind States an exemption from their obligation to limit their contributions to downwind States' air-quality problems, while downwind States would continue to suffer the health, welfare, and regulatory consequences of upwind States' disregard of their statutory obligations. Neither the plain language of the Act nor the principles of cooperative federalism that inform its structure authorize that result.

CONCLUSION

The judgment of the court of appeals should be reversed.

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RESPONDENT'S BRIEF

Nos. 12-1182 and 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners,

v.

EME HOMER CITY GENERATION L.P., ET AL.,
Respondents.

AMERICAN LUNG ASSOCIATION, ET AL.,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS UTILITY AIR REGULATORY GROUP, *ET AL.*

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QUESTIONS PRESENTED

The Clean Air Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), requires States to include in implementation plans "adequate provisions" that, "consistent with the provisions" of Title I of the Act, prohibit sources within their borders from emitting air pollutants in "amounts" that "contribute significantly" to other States' "nonattainment" of national ambient air quality standards (NAAQS). Invoking this provision, the Environmental Protection Agency (EPA) adopted the Transport Rule, requiring upwind-state emission reductions without regard to whether the required reductions went beyond those needed to eliminate a State's significant contribution and without regard to whether those reductions went beyond those needed for NAAQS attainment.

The questions presented are as follows:

1. Whether EPA's refusal to allow state implementation of the EPA-determined reduction requirements at the program's outset was unlawful.

2. Whether EPA lacks authority under the good neighbor provision to prohibit upwind-state emissions that reach a downwind State in amounts that EPA expressly found do not contribute significantly to nonattainment.

3. Whether EPA was required to assure that Transport Rule emission reductions do not exceed the amounts needed for NAAQS attainment.

4. Whether EPA was required to base good-neighbor emission reduction requirements on only the fraction of an upwind State's total emissions that reach a downwind State and contribute significantly to nonattainment in that State.

5. Whether the court of appeals had jurisdiction to consider *Chevron* step-one challenges to the rule.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding is set forth at pages II-IV of the Brief for the Federal Petitioners.

RULE 29.6 STATEMENTS

The **Utility Air Regulatory Group** (UARG) is a not-for-profit association of individual electric utilities and electric generating companies and national trade associations that participates on behalf of its members collectively in administrative proceedings under the Clean Air Act, and in litigation arising from those proceedings, that affect electric generators. UARG has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in UARG.

Southern Company Services, Inc., **Alabama Power Company**, **Georgia Power Company**, **Gulf Power Company**, **Mississippi Power Company**, and **Southern Power Company** are all wholly-owned subsidiaries of Southern Company, which is a publicly-held corporation. Other than Southern Company, no publicly-held company owns 10 percent or more of any of these respondents' stock. No publicly-held company holds 10 percent or more of Southern Company's stock. Southern Company stock is traded publicly on the New York Stock Exchange under the symbol "SO." Through its subsidiaries, Southern Company is a leading U.S. producer of electricity, generating and delivering electricity to over four million customers in the southeastern United States. Southern Company subsidiaries include four vertically integrated electric utilities—

Alabama Power Company, Georgia Power Company, Gulf Power Company, and Mississippi Power Company—as well as Southern Power Company, which owns generation assets and sells electricity at market-based rates in the wholesale market. These subsidiaries, each a respondent here, operate nearly 46,000 megawatts of coal, natural gas, oil, nuclear, and hydroelectric generating capacity. Southern Company Services, Inc. is the services company for Southern Company and its operating subsidiaries. Southern Company Services, Inc. provides, among other things, engineering and other technical support for the operating companies.

Pursuant to Rule 29.6 of the Supreme Court of the United States, counsel for the Environmental Committee of the Florida Electric Power Coordinating Group, Inc. certifies that the **Florida Electric Power Coordinating Group, Inc.** (FCG), is a non-profit, non-governmental corporate entity organized under the laws of Florida. The FCG does not have a parent corporation. No publicly held company owns 10 percent or more of the FCG's stock.

The **Midwest Ozone Group** is an unincorporated association of businesses and organizations formed to assist in the development of scientifically sound and effective air quality strategies. The Midwest Ozone Group has no outstanding shares or debt securities in the hands of the public and has no parent company. No publicly held company has a 10 percent or greater ownership interest in the Midwest Ozone Group.

Pursuant to Supreme Court Rule 29.6, counsel for the **National Mining Association** (NMA) certifies

that the NMA is an incorporated national trade association whose members include the producers of most of America's coal, metals, and industrial and agricultural minerals; manufacturers of mining and mineral processing machinery, equipment, and supplies; and engineering and consulting firms that serve the mining industry. NMA has no parent company, and NMA has not issued shares or debt securities to the public, although NMA's individual members have done so.

The **National Rural Electric Cooperative Association** (NRECA) is the national association of rural electric cooperatives. NRECA does not have a parent corporation, and no publicly held company owns 10 percent or more of its stock.

Pursuant to Supreme Court Rule 29.6, counsel for **Peabody Energy Corporation** certifies that it is a publicly-traded company on the New York Stock Exchange under the symbol "BTU." Peabody Energy Corporation does not have a parent company, and as of December 31, 2012 filings, no holding companies own 10 percent or more of Peabody Energy Corporation's outstanding shares.

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The opinion of the court of appeals (Pet. App. 1a-116a) is reported at 696 F.3d 7 (D.C. Cir. 2012). The final rule of the Environmental Protection Agency (EPA or Agency) (Pet. App. 117a-1417a) is reported at 76 Fed. Reg. 48,208 (Aug. 8, 2011).

JURISDICTION

The judgment of the court of appeals was entered on August 21, 2012. Petitions for rehearing were denied on January 24, 2013 (Pet. App. 1459a-1462a). The petitions for writs of certiorari were filed on March 29, 2013, and granted (and consolidated) on June 24, 2013. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set out in an appendix to the Brief for the Federal Petitioners.

STATEMENT OF THE CASE

I. Statutory and Regulatory Background

1. The Clean Air Act (CAA or Act) employs a "cooperative federalism" approach to the development and implementation of air quality standards. As described by the State and Local Government Respondents supporting affirmance of the court of appeals' decision, EPA defines air quality "ends," and the States then choose the "means" to achieve those ends through state implementation plans (SIPs). Brief of Respondents State of Texas, *et al.* (hereinafter Brief of State and Local Government Respondents or State Br.), at 1-2; see 42 U.S.C. § 7410(a). In

this way, the CAA makes control of air pollution "the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3); see *id.* § 7407(a).

The CAA directs States to implement a series of programmatic requirements in their SIPs, which result in future emission reductions consistent with the terms of the specific CAA programs being implemented. See 42 U.S.C. § 7410(a)(2). Such programmatic requirements include, for example, "New Source Review" permitting programs, *id.* § 7410(a)(2)(C); visibility protection requirements, *id.* § 7410(a)(2)(J); and the "good-neighbor" program, which requires that SIPs "contain adequate provisions . . . prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act]" emissions of pollutants from sources within the State that will "contribute significantly to nonattainment" of national ambient air quality standards (NAAQS) in any other State. *Id.* § 7410(a)(2)(D).

This case involves the peculiar challenges posed by implementation of the good-neighbor program in the context of regional air pollution problems.

2. Before its amendment in 1990, the good neighbor provision focused on localized interstate impacts on nonattainment. That pre-1990 version targeted emissions from "any stationary source" in one State that "prevent[ed]" attainment of NAAQS in another State. *Air Pollution Control Dist.* v. *EPA*, 739 F.2d 1071, 1075-76 (6th Cir. 1984) (quoting pre-1990 version of good neighbor provision). The provision was structured to deal with NAAQS like the one for sulfur dioxide that involve elevated local pollution caused by emissions from a nearby source or a discrete group of nearby sources. See *id.* at 1075-77;

Connecticut v. *EPA*, 656 F.2d 902, 906 (2d Cir. 1981). The pre-1990 version was never used to address NAAQS like the ones for ozone or fine particulate matter ($PM_{2.5}$). NAAQS for those pollutants address regional pollution formed through the transport and chemical transformation of so-called "precursor" pollutants that are emitted by numerous stationary and mobile sources over a large geographic area. See generally EPA, EPA-454/B-07-002, Guidance on the Use of Models and Other Analyses for Demonstrating Attainment of Air Quality Goals for Ozone, $PM_{2.5}$, and Regional Haze at 4-5 (Apr. 2007), available at www.epa.gov/scram001/guidance_sip.htm (describing how ozone and $PM_{2.5}$ can result from precursor emissions far upwind).

In 1990, Congress amended the good neighbor provision to better address this type of regional pollution. See 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998) ("Under the 1990 Amendments, Congress recognized the growing evidence that ozone and its precursors can be transported over long distances and that the control of transported ozone was a key to achieving attainment of the ozone standard across the nation."). As amended in 1990, the provision covered all "emissions activity within the State," not just "any stationary source" in the State. And the trigger for regulation was changed from emissions that "prevent attainment" to those that "contribute significantly to nonattainment." The good neighbor provision now provides that SIPs must:

> contain adequate provisions—
>
> (i) prohibiting, consistent with the provisions of this subchapter [*i.e.*, Title I of the Act], any source or

> other type of emissions activity within the State from emitting any air pollutant in amounts which will—
>
> (I) contribute significantly to nonattainment in . . . any other State with respect to any such national primary or secondary ambient air quality standard . . . .

42 U.S.C. § 7410(a)(2)(D).

The text of the good neighbor provision establishes two criteria that define the scope of the contemplated "prohibit[ion]" on emissions that "contribute significantly to nonattainment." First, only "significant[ ]" contributions to ambient air quality that is in "nonattainment" are properly subject to regulation by EPA. Accordingly, the provision cannot be invoked to prohibit emissions that contribute *insignificantly* to nonattainment or that contribute to air quality that is as good as, or better than, the NAAQS. Second, only that portion of the total emissions from an upwind State that both reaches a downwind State *and* contributes significantly to nonattainment in that State may be subject to the regulatory requirement. The good neighbor provision, in other words, targets only that portion of the upwind State's emissions that contributes significantly to nonattainment areas in downwind States. It cannot be used to require regulation of emissions that are not transported outside the upwind State to such a downwind area.

The good neighbor provision is but one of the emission reduction measures Congress established to address nonattainment. In establishing this measure, Congress mandated that any prohibition on

emissions that contribute "significantly" must be "*consistent with* the provisions of [Title I of the CAA]." 42 U.S.C. § 7410(a)(2)(D)(i) (emphasis added). Thus, EPA's "significant contribution" reduction requirements not only must observe the statutory limits discussed above but also must be "consistent with" separate but related CAA provisions.

Two elements are common to all of the statutory requirements in Subpart D of Title I of the CAA, 42 U.S.C. §§ 7501-7515, that relate to *intrastate* nonattainment SIPs. First, nonattainment emission reduction requirements must stop at the point of NAAQS attainment. Second, reduction requirements must be moderated where achieving attainment would be infeasible or otherwise entail excessive costs. See, *e.g.*, 42 U.S.C. § 7502(c)(2) ("plan provisions shall require reasonable further progress" toward attainment); *id.* § 7501(1) (defining "reasonable further progress" as "such annual incremental reductions in emissions . . . as . . . may reasonably be required . . . for the purpose of ensuring attainment"); *id.* § 7502(c)(1) ("[s]uch plan provisions shall provide for the implementation of all reasonably available control measures," including "reasonably available control technology"); 40 C.F.R. § 51.100(o) (defining "[r]easonably available control technology" as including consideration of control costs); 42 U.S.C. § 7511b(d) (providing that, in support of state plan development, EPA "shall provide guidance to the States to be used in evaluating the relative cost-effectiveness of various options for the control of emissions from existing stationary sources . . . which contribute to nonattainment"); *id.* § 7509(d) ("[c]onsequences for failure to attain" NAAQS in an area include imposition of "such additional measures

as [EPA] may reasonably prescribe, including all measures *that can be feasibly implemented in the area in light of technological achievability, costs, and any . . . health and environmental impacts*" (emphasis added)).[1]

To be "consistent with" these intrastate nonattainment provisions, EPA, in establishing good-neighbor emission reduction obligations, may use costs and feasibility to moderate the level of emission reductions that otherwise would be required where limiting contributions to nonattainment in a downwind State would otherwise be unreasonable. As the court below observed: "EPA may consider cost, but only to further lower an individual State's [emission reduction] obligations" under the good neighbor provision. Pet. App. 27a (citing *Michigan* v. *EPA*, 213 F.3d 663, 675 (D.C. Cir. 2000) (per curiam); *North Carolina* v. *EPA*, 531 F.3d 896, 918 (D.C. Cir.) (per curiam), *modified on other grounds on reh'g*, 550 F.3d 1176 (D.C. Cir. 2008) (per curiam)).

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[1] See also 42 U.S.C. § 7511(b)(2) (providing that, for ozone, the consequence of an area's failure to attain generally is "reclassification" of the area so as to provide more time for attainment and to require application of additional, feasible controls); *id.* § 7513(e) (providing that, for particulate matter, attainment deadlines may be extended if attainment by the otherwise-applicable statutory date "would be impracticable" and the State demonstrates it has required the most stringent measures that "can feasibly be implemented in the [nonattainment] area" in question).

II. EPA's Approach to Defining Good-Neighbor Emission Reduction Obligations for Regional Pollution Problems

A. EPA's Decision To Define States' Good-Neighbor Emission Reduction Obligations Through Separate and Distinct Comprehensive Regional Programs

EPA first invoked the amended good neighbor provision to address a regional pollution problem in the late 1990s in the rulemaking that became known as the "NOx SIP Call."[2] See 63 Fed. Reg. 57,356 (Oct. 27, 1998). In that rulemaking, EPA addressed significant contributions to nonattainment of NAAQS for the pollutant ozone and, in this context, addressed what it means to "contribute significantly to nonattainment." See *id.* at 57,369.

For other CAA SIP programs, EPA has promulgated regulations that establish generally applicable requirements for identifying emissions that might need to be reduced and criteria for developing future emission limitations under those programs. EPA uses this "how-to manual" approach, for example, in addressing SIPs required by 42 U.S.C. § 7410(a)(2)(J) to implement the CAA visibility protection program, which calls for "reasonable progress" toward a national visibility goal, 42 U.S.C. § 7491(b)(2). EPA does not itself identify specific "reasonable progress" emission reductions for each State to implement through SIP revisions. Rather, EPA's regulations provide instructions for States to follow in developing their own "reasonable progress" emission reduction

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[2] "NOx" means "nitrogen oxides."

requirements for their SIPs. See 40 C.F.R. § 51.308(d), (e).

Theoretically, EPA could have developed a similar approach with respect to the good neighbor provision. If EPA had done so, then immediately after EPA promulgated any new NAAQS, each State would have had a defined process to follow that would allow it to identify—and to develop control requirements that would satisfy—any good-neighbor emission reduction obligations it might have. But, instead of establishing a process that would allow each State to determine whether emission reductions are required—and, if they are, to determine the required amounts of those reductions—EPA opted for a federal rulemaking approach on a multi-state scale, under which EPA itself (1) identifies those States that have good-neighbor emission reduction obligations, (2) defines or quantifies those obligations for each chosen State, and then (3) gives each such State the opportunity to implement those obligations through SIP revisions. See 63 Fed. Reg. at 57,369, 57,376.

In its NOx SIP Call rulemaking, EPA selected this multi-state approach because NOx and other ozone precursors emitted over a wide geographic area can contribute to ozone concentrations in the ambient air hundreds of miles away, through a variety of chemical and atmospheric processes that transform those precursors into ground-level ozone. See *id.* at 57,359, 57,360. As EPA explained:

> It is becoming increasingly apparent that some of the most highly polluted ozone nonattainment areas will not be able to demonstrate attainment simply

> through the implementation of control measures within the nonattainment area. In some cases, significant ozone concentration and precursor emission reductions within the upwind air mass being transported into the nonattainment area also appear to be necessary.

62 Fed. Reg. 1420, 1422 (Jan. 10, 1997).

EPA recognized that its decision to define by regulation the good-neighbor emission reduction obligations of upwind States must be harmonized with the CAA's cooperative federalism structure. Under this structure, EPA could not simultaneously define the reduction obligation and dictate the measures that sources in each covered State must use to meet that obligation. See *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410(a)(2)], and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards.") (citing 42 U.S.C. § 7410(c)). Rather, the States must be given an opportunity to implement their emission reduction obligations as newly defined by EPA. Accordingly, EPA used the CAA's SIP call provision—42 U.S.C. § 7410(k)(5)—and gave each State included within the program the opportunity and time to revise its SIP to implement its EPA-defined statewide good-neighbor emission reduction obligation. EPA's approach in this respect was consonant with the Act's core structure, under which EPA promulgates NAAQS or regulations governing programmatic emission reduction requirements, and

States determine the mix of controls to implement those EPA-defined control objectives. As EPA explained in promulgating the NOx SIP Call,

> [o]nce EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of [42 U.S.C. § 7410(a)(2)(D)]), it falls to the State to determine the appropriate mix of controls . . . .

63 Fed. Reg. at 57,369.

This decision, whatever its merit, had consequences for the establishment of future good-neighbor emission reduction obligations to address regional pollution problems. In particular, EPA's decision meant that a State would not—indeed, could not—know whether it "significantly contributed" to downwind nonattainment, and, if so, what emission reductions the good neighbor provision demanded of it, until EPA had conducted and completed a comprehensive good-neighbor regional rulemaking.

As EPA explained,

> the data and analytical tools available at the time the section [7410(a)(2)(D)] SIP is developed and submitted to EPA necessarily affect the content of the [SIP] submission [required after promulgation of a new NAAQS]. Where . . . the data and analytical tools to identify a significant contribution from upwind States to nonattainment areas in downwind States are available [*i.e.*, where EPA has adopted a final rule

> identifying good-neighbor reductions for covered States], the State's SIP submission must address the existence of the contribution and the emission reductions necessary to eliminate the significant contribution.

70 Fed. Reg. 25,162, 25,263 (May 12, 2005). Because some States would be evaluated in EPA's regional rulemaking, however, EPA recognized that

> *the section [7410(a)(2)(D)] SIP submission [for such a State] should indicate that the necessary information is not available at the time the submission is made . . . . EPA [will] . . . act at a later time after the initial section [7410(a)(2)(D)] submissions to issue a SIP call under section [7410(k)(5)] to States to revise their SIPs to provide for additional emission controls to satisfy the section [7410(a)(2)(D)] obligations if such action [is] warranted based upon subsequently-available data and analyses.*

Id. at 25,263-64 (emphasis added). In other words, if a State is not in a multi-state good-neighbor program, it has no obligation to submit a SIP requiring additional emission controls. If controls are found to be needed later, EPA will identify the State's emission reduction obligation at that time through a SIP call rulemaking.

B. The NOx SIP Call and CAIR

The briefs of State and Local Government Respondents and of Industry and Labor Respondents

discuss EPA's first two regional good-neighbor programs—the NOx SIP Call, which addressed good-neighbor obligations under the 1997 "8-hour" ozone NAAQS and the 1979 "1-hour" ozone NAAQS, and the Clean Air Interstate Rule (CAIR), which addressed the 1997 NAAQS for 8-hour ozone and for annual $PM_{2.5}$. This brief will not duplicate that discussion but emphasizes three important features of these programs that bear on the questions addressed here.

First, both of these programs used the same basic two-step framework for identifying and quantifying the good-neighbor emission reduction obligations for regionally widespread pollutants like ozone and $PM_{2.5}$. That framework requires EPA: (1) to identify which States have emission reduction obligations and which do not; and (2) to define, in quantitative terms, that obligation for each covered State. See, *e.g.*, 63 Fed. Reg. at 57,365.

Second, as discussed in the Brief of State and Local Government Respondents, both the NOx SIP Call and CAIR respected the CAA's cooperative federalism structure by calling on States to submit SIPs to implement the emission reduction obligations identified in EPA's comprehensive rule. The NOx SIP Call gave States "real choice" as to how to implement the obligations defined by EPA. *Michigan*, 213 F.3d at 687-88. CAIR likewise gave the States "the flexibility to choose the measures to adopt to achieve the specified emissions reductions." 70 Fed. Reg. at 25,167.

Finally, each of EPA's multi-state programs, including the Transport Rule, was unique. It was impossible for any State to know definitively whether it

would be included in these multi-state programs at all, let alone what its precise reduction obligations would be, until EPA took final rulemaking action resolving those issues. EPA relied exclusively on its own modeling to identify the States contributing to ozone and $PM_{2.5}$ nonattainment at levels exceeding the EPA-specified "insignificance" thresholds and to unravel the linkages between upwind and downwind States. Each of EPA's good-neighbor rulemakings was infused with myriad technical assumptions and policy judgments that were subject to change between EPA's proposal and its final promulgation of each program. As a result, predicting the outcome of these determinations in advance for each of these distinct good-neighbor programs would have been impossible—a "fool's errand." State Br. at 40.

III. The Transport Rule

In August 2010, EPA proposed the Transport Rule as its response to the D.C. Circuit's remand of CAIR in *North Carolina*. 75 Fed. Reg. 45,210 (Aug. 2, 2010). EPA promulgated the final Transport Rule a year later. 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a-1417a).

In the Transport Rule, EPA created, "from the ground up," *North Carolina*, 531 F.3d at 929, a new good-neighbor emission reduction program, covering different States, addressing an additional NAAQS, and imposing different emission reductions than did CAIR or the NOx SIP Call. In developing the Transport Rule, EPA applied its two-step framework to develop programs for the 1997 NAAQS for ozone and $PM_{2.5}$ addressed in CAIR as well as the newer, 2006 "24-hour" NAAQS for $PM_{2.5}$.

At step one, EPA found that upwind-state emissions contributing less than one percent of the relevant NAAQS to any downwind area "do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a). EPA used this insignificance threshold to identify those States that were not subject to *any* good-neighbor emission reduction obligation for the ozone and $PM_{2.5}$ NAAQS. For those States contributing above the threshold, EPA in step two defined their emission reduction obligations using cost-effectiveness criteria that differed from those used in earlier programs. See 75 Fed. Reg. at 45,233 (contrasting Transport Rule cost analysis with that in the NOx SIP Call and CAIR).

The coverage of States in the proposed Transport Rule differed from that in CAIR, with some States added and others removed. *Id.* at 45,338 (explaining differences in coverage between CAIR and the proposed Transport Rule). The coverage also changed between the proposed and final rules for each of the NAAQS being addressed. Initially, a total of 31 States and the District of Columbia had emission reduction responsibilities. *Id.* at 45,212-13 (24 jurisdictions for annual $PM_{2.5}$ NAAQS; 25 for 24-hour $PM_{2.5}$ NAAQS; and 26 for ozone NAAQS). But the States covered by the program remained in flux until EPA promulgated the final Transport Rule. In the final rule, EPA imposed emission reduction obligations on Texas without prior notice, while EPA dropped other States from the program altogether. EPA included 27 States in the final rule. 76 Fed. Reg. at 48,210 (Pet. App. 130a-131a) (18 States for annual $PM_{2.5}$ NAAQS; 21 for 24-hour $PM_{2.5}$ NAAQS; and 20 for ozone NAAQS).

Two aspects of the final Transport Rule are important here. First, unlike its predecessors, the Transport Rule did not call on States to develop and submit SIPs establishing the means for accomplishing the EPA-defined ends. To the contrary, EPA immediately imposed federal implementation plans (FIPs) to implement those obligations. *Id.* at 48,208, 48,212, 48,219-20 (Pet. App. 117a, 139a-142a, 170a-176a).

Second, EPA declined to evaluate whether the emission reductions mandated by the final rule conformed to limits imposed by the text of the good neighbor provision—*i.e.*, whether the final rule's requirements assured that emissions that either make no contribution or make only an "insignificant" contribution to nonattainment would be excluded from the rule's coverage.

IV. The Decision of the Court of Appeals

When the D.C. Circuit was asked to review the Transport Rule, the court began, as every reviewing court must, by identifying the statutory limits imposed on agency authority. It then assessed EPA's action in the context of those statutory limits.

As a result of this analysis, the court found that the Transport Rule violated the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) and the D.C. Circuit's mandate in *North Carolina*. The rule crossed three clear statutory limitations on EPA's authority by: (1) requiring reductions in emissions that contribute insignificantly to downwind nonattainment; (2) requiring greater emission reductions than needed to achieve attainment; and (3) requiring reductions in emissions from an upwind State that would never

reach the downwind nonattainment areas in question. Pet. App. 31a-40a. The court also found that EPA had no authority under 42 U.S.C. § 7410(c) to promulgate FIPs implementing this new and unique multi-state program without first having defined the end required of States (*i.e.*, state emission budgets) and then having given each State an opportunity to choose the means of achieving those ends through development and submittal of a SIP.

SUMMARY OF ARGUMENT

The court of appeals correctly held that EPA acted beyond its statutory authority in promulgating the Transport Rule and that the rule was therefore unlawful. The court of appeals' decision should be affirmed.

I.A. The court of appeals had jurisdiction to address the FIP-before-SIP issue. Only the Transport Rule FIPs were before the court. No other EPA actions were affected by the court of appeals' vacatur of those FIPs. The Transport Rule FIPs and earlier SIP disapprovals (and findings of failure to submit) were separate and distinct EPA actions. As petitioners below were not collaterally attacking any earlier EPA actions, there was no jurisdictional impediment to the court's review of the merits of petitioners' FIP-before-SIP argument.

I.B. EPA chose to establish good-neighbor emission reduction requirements for ozone and $PM_{2.5}$ NAAQS through regional emission reduction programs. As a result, a State's good-neighbor ozone and $PM_{2.5}$ SIP obligations depended entirely on whether that State was included in the Transport Rule. Under any CAA program that must be imple-

mented in SIPs, States must be given the opportunity to exercise their statutory role at the implementation stage. The Transport Rule denied States that right.

The court of appeals correctly determined that the approach that EPA took in the Transport Rule was contrary to how the CAA's cooperative federalism structure works. EPA's argument here that States could have escaped EPA's imposition of a FIP by undertaking the regional analyses necessary to identify amounts of emissions that must be abated under the good neighbor provision conflicts with the system EPA chose to create to address regional interstate pollution. As EPA concluded in 1998, with respect to the ozone NAAQS, it was "EPA's responsibility" to determine the overall level of air pollutants that could be emitted in a given State without violating 42 U.S.C. § 7410(a)(2)(D)(i)(I). 63 Fed. Reg. at 57,369.

EPA reiterated this view of the good neighbor provision's applicability to regional pollution in defending the NOx SIP Call and in its CAIR rulemaking. The position EPA takes now in defense of the Transport Rule, however, flatly contradicts these long-standing pronouncements. And EPA's own actions in approving and disapproving good-neighbor SIPs establish that any SIP submittal by a potential Transport Rule State that was premised on the State's *not* contributing significantly to downwind nonattainment could not (and would not) have been approved until EPA concluded *in the final Transport Rule* that the State was outside the program.

II.A. The court of appeals correctly determined that the Transport Rule was statutorily flawed in

three distinct respects. The court's conclusion that the rule must be vacated as contrary to clear congressional intent should therefore be affirmed.

The first flaw is that the Transport Rule required upwind States to reduce amounts of pollutants that EPA itself had found to be "insignificant." Under 42 U.S.C. § 7410(a)(2)(D)(i)(I), the court of appeals held, EPA lacked statutory authority to compel such reductions. Once EPA found that amounts below one percent of the relevant NAAQS did not "contribute significantly" to nonattainment, EPA was precluded from requiring States to eliminate any portion of those "insignificant" contributions.

The second flaw is that the Transport Rule requires upwind-state reductions in emissions that never leave the State or contribute to downwind-state nonattainment. Because only part of the emissions originating in an upwind State will leave that State, and only a fraction of that part will "contribute significantly" to nonattainment in a downwind State, EPA exceeded its section 7410(a)(2)(D)(i)(I) authority.

The third flaw is that EPA failed in the Transport Rule to ensure that the collective obligations of the upwind States, when aggregated, did not produce unnecessary over-control (*i.e.*, more upwind-state emission controls than needed to achieve attainment of the NAAQS in downwind States). Under the plain terms of the good neighbor provision, the court held, EPA was required to account for such over-control. EPA does not here dispute the court of appeals' reading of the statute. The Agency can only suggest that the court's concern was theoretical in nature. But the record below contradicts EPA's attempts to dis-

miss the court's determination that the Transport Rule failed to respect this statutory limitation on EPA's authority.

II.B. The court of appeals had jurisdiction to consider the statutory objections to the lawfulness of the Transport Rule's "significant contribution" emission reduction requirements that were raised below. In addressing the statutory limits on EPA's "significant contribution" rulemaking authority, the court acted in accordance with its powers as a reviewing court.

The CAA imposes on a court reviewing EPA FIPs the obligation to "reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9). That is what the court of appeals did: it determined that the Transport Rule failed as a matter of law. In so doing, the court acted in a manner consistent with the principles that underpin the administrative exhaustion doctrine and did not contravene the provisions of 42 U.S.C. § 7607(d)(7)(B). EPA argues here for a regime under which agencies would be discharged from obeying clear statutory commands, and reviewing courts would be precluded from exercising their constitutional and statutory responsibilities, whenever EPA claims that a statute's plain meaning is not spelled out with sufficient specificity in a rulemaking comment. That is not the law.

ARGUMENT

I. The Court of Appeals' Invalidation of EPA's FIP-Before-SIP Approach Should Be Affirmed.

A. The Court of Appeals Had Jurisdiction To Address the FIP-Before-SIP Issue.

The challenge below to EPA's FIP-before-SIP approach arose in briefing timely-filed petitions to review EPA's Transport Rule FIPs. Neither in those petitions nor in the briefs below did anyone argue that the earlier EPA actions disapproving SIPs and making findings of failure to submit SIPs should be set aside. Accordingly, the court below vacated only the Transport Rule FIPs; it rendered no judgment and made no disposition with respect to any other EPA action. As a result, petitioners below did not collaterally attack earlier EPA actions. For that reason, and the reasons presented in the Brief of State and Local Government Respondents, there was no jurisdictional impediment to the court of appeals' review of the merits of the FIP-before-SIP argument.

Petitioners also largely ignore timely petitions filed by Georgia, Kansas, and Ohio for judicial review of EPA's disapproval of their respective good-neighbor SIP submissions.[3] Proceedings on those pe-

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[3] These EPA disapprovals are published at 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 43,159 (July 20, 2011) (Georgia); and 76 Fed. Reg. 43,175 (July 20, 2011) (Ohio). Petitions to review the disapproval of the Kansas and Georgia SIPs are pending in the D.C. Circuit. See *Westar Energy, Inc.* v. *EPA*, No. 11-1333 (D.C. Cir. filed Sept. 19, 2011); *Georgia* v. *EPA*, No. 11-1427 (D.C. Cir. filed Nov. 3, 2011). A petition to review the disapproval of the Ohio SIP is pending in the Sixth

titions for review have been stayed in the courts of appeals pending the outcome of this case.[4] But those SIP disapproval cases are independent of this Transport Rule FIP case. Consider what will happen to the SIP cases after the present case concludes.

Those pending SIP cases will be disposed of in one of two ways depending upon this Court's disposition of the present case. If the Court affirms the D.C. Circuit's decision and adopts its reasoning on the FIP-before-SIP issue, the issues in those SIP disapproval cases may be narrowed but not resolved. For example, EPA disapproved Kansas's SIP submission for two reasons: (1) it failed to anticipate the outcome of the Transport Rule; and (2) it was not supported by sufficient data. A Kansas challenge as to reason (1) would likely be rendered moot by a decision affirming the D.C. Circuit's reasoning, but a challenge as to reason (2) would not be moot. Kansas would need to prevail in its challenge on that latter basis to prevent EPA from including Kansas in a successor to the Transport Rule.

Circuit. See *Ohio* v. *EPA*, No. 11-3988 (6th Cir. filed Sept. 19, 2011).

[4] The Georgia and Kansas SIP disapproval cases were stayed at EPA's request. EPA, in a joint submission with the States, argued that the SIP disapproval cases should be stayed pending the outcome of the review of the Transport Rule because the decision in the Transport Rule case "could narrow or eliminate some issues that would otherwise be presented in [the SIP disapproval] litigation, or eliminate the need for litigating [the SIP disapproval] case[s] altogether." Joint Motion To Hold Case in Abeyance ¶ 6, *Georgia* v. *EPA*, No. 11-1427 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353040; Joint Motion To Hold Case in Abeyance ¶ 6, *Westar Energy, Inc.* v. *EPA*, No. 11-1333 (D.C. Cir. Jan. 17, 2012), Doc. No. 1353039.

On the other hand, if this Court were to agree with EPA that the States' challenge was a collateral attack on these SIP disapprovals, and vacates that part of the decision below for lack of jurisdiction, then the issue would be back before the court of appeals almost immediately. The abeyance of the SIP disapproval cases would be lifted, and the D.C. Circuit would be asked to consider the questions that EPA says should have been considered on review of the SIP disapprovals and not in this case. If the D.C. Circuit were to adopt in those cases the same reasoning it applied in its merits decision on review here—as one must assume it would—and find the SIP disapprovals to be unlawful, then the Transport Rule FIPs for these States as they relate to the 2006 $PM_{2.5}$ NAAQS would lack a lawful predicate and therefore would be vacated. And, because the Transport Rule FIPs are not severable, all other Transport Rule FIPs would fall as well. See State Br. at 23.

B. Approval of Good-Neighbor SIP Submissions Depended Entirely on Whether the State Was Included in the Transport Rule.

There are good reasons why EPA opted to define "contribute significantly" with respect to ozone and $PM_{2.5}$ NAAQS through comprehensive rulemakings governing multiple States. Ozone and $PM_{2.5}$ are fairly described as regional pollution problems that demand regional solutions. But that approach is consistent with the CAA only if States are given an opportunity to perform their statutory role at the implementation stage. *Michigan*, 213 F.3d at 687.

EPA failed to give States that opportunity in the Transport Rule. State Br. at 12-13. EPA simultane-

ously (1) identified the States that had any good-neighbor emission reduction obligations; (2) defined what those obligations would be; and (3) imposed FIPs to implement those obligations. This, the court of appeals correctly held, is not how the CAA's cooperative federalism structure is designed to work.

EPA responds by suggesting that the States could have done their jobs without EPA's help. EPA Br. at 26 ("Nothing in the Act makes the timing of the State's submission contingent on prior action by the EPA to define what portion of its contribution to downwind nonattainment is 'significant.'"). If States simply had performed the technical analyses themselves, EPA argues, they could have identified emissions that must be abated under the good neighbor provision and thus would have escaped EPA's FIPs. *Id.* at 27.

This litigation position is fundamentally at odds with the system EPA created in 1998 and with repeated Agency pronouncements since then. From the outset, EPA rejected adoption of a regulatory system that would allow States to determine for themselves what their good-neighbor emission reduction obligations would be. Cf., *e.g.*, 40 C.F.R. § 51.308(d)(1) (regulations telling States how to derive the emission reductions necessary to make "reasonable progress" toward visibility objectives). Instead, EPA concluded in 1998 that, for NAAQS like the ozone NAAQS, "[d]etermining the overall level of air pollutants allowed to be emitted in a State [without violating section 7410(a)(2)(D)]" would be "EPA's responsibility." 63 Fed. Reg. at 57,369. "Once EPA determines the overall level of reductions (by assigning the aggregate amounts of emissions that must be eliminated to meet the requirements of section

[7410(a)(2)(D)])," *id.*, States would be responsible for choosing the mix of controls to abate those emissions.

Until it developed the Transport Rule, EPA readily acknowledged that its regional rulemaking approach was the administrative path EPA chose to create good-neighbor obligations that would trigger adoption of emission reduction SIPs. In the preamble to CAIR, for example, EPA explained that States outside the regional rulemaking were not required to adopt good-neighbor SIPs reducing their emissions. Instead, EPA explained, it can "issue a SIP call . . . to States to revise their SIPs to provide for additional emission controls to satisfy . . . [good-neighbor] obligations . . . based upon subsequently-available data and analyses." 70 Fed. Reg. at 25,263-64. EPA's argument here ignores this historical understanding and contradicts the arguments it advanced to defend its regional rulemaking approach when it was challenged in the court of appeals following promulgation of the NOx SIP Call. See *Michigan*, 213 F.3d at 685-88.

EPA's argument here also is contradicted by its actions in approving and disapproving good-neighbor SIPs submitted in response to the 2006 $PM_{2.5}$ NAAQS. That record demonstrates that no State that EPA later included in the Transport Rule could have developed and submitted a SIP that EPA would have approved. The sole criterion that would allow EPA to approve a good-neighbor SIP submission under the 2006 $PM_{2.5}$ NAAQS was whether the State making the submission was excluded from the final Transport Rule's coverage.

Compare the experience of Kansas, a State that EPA included in the final Transport Rule, and that of

Delaware, a State that EPA did not include in the final Transport Rule. Kansas and Delaware each submitted a SIP attempting to demonstrate through modeling data that the State did not contribute significantly to nonattainment or interfere with maintenance. EPA disapproved Kansas's submittal based on EPA's Transport Rule modeling supporting Kansas's inclusion in the Transport Rule. 76 Fed. Reg. at 43,145. EPA approved Delaware's submittal based on Transport Rule modeling that excluded Delaware from the program. 76 Fed. Reg. 53,638 (Aug. 29, 2011). In that approval, EPA made clear that it would have disapproved Delaware's SIP if EPA had made that State subject to the final Transport Rule. See *id.* at 53,638-39.

Because—and only because—Delaware was not included in the Transport Rule, EPA could approve the SIP, even though Delaware's technical demonstration was no more robust than the CAIR-based modeling provided by Kansas. *Id.* In short, whatever EPA may say now, the truth is that any submission by any potential Transport Rule State premised on the State not contributing significantly to downwind nonattainment could not have been approved before EPA promulgated the final Transport Rule with that State being excluded from coverage.

The Kansas and Delaware examples demonstrate that coverage of the good-neighbor regional program was dependent on promulgation of the Transport Rule in final form. As a result, specific emission reduction obligations for covered States did not, as a matter of law, come into existence until EPA's rule

was final.[5] No State may be required to submit a SIP now in order to satisfy requirements that are to be defined in the future. Cf. *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."). And no State was required to guess the terms of the Transport Rule in preparing SIP submissions years before EPA promulgated that rule. As the State and Local Government Respondents argue, this is a classic case of "hide the ball." State Br. at 20, 39. It is completely inconsistent with a system of cooperative federalism.

II. The Transport Rule Impermissibly Exceeds Statutory Boundaries.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Georgetown Univ. Hosp.*, 488 U.S. at 208. EPA "is a

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[5] Similarly, the regulatory consequence of failing to submit a good-neighbor SIP following promulgation of the 2006 $PM_{2.5}$ NAAQS depended entirely on the outcome of EPA's Transport Rule rulemaking. On June 9, 2010, EPA found that 29 States and territories had failed to submit good-neighbor SIPs for the 2006 $PM_{2.5}$ NAAQS. 75 Fed. Reg. 32,673 (June 9, 2010). Seventeen of those States and territories were not identified in the Transport Rule as "significantly contributing" to nonattainment of the 2006 $PM_{2.5}$ NAAQS in downwind States within the Transport Rule region. EPA has not imposed a FIP on any of these States. Indeed, EPA announced it had determined that, in light of its Transport Rule findings, one of those States—North Dakota—need not modify its SIP at all to address the good neighbor provision with respect to the 2006 $PM_{2.5}$ NAAQS. 78 Fed. Reg. 45,457 (July 29, 2013).

creature of statute, and has only those authorities conferred upon it by Congress; if there is no statute conferring authority, a federal agency has none." *North Carolina*, 531 F.3d at 922 (internal quotation marks omitted).

When establishing States' emission reduction obligations as part of a multi-state good-neighbor program, EPA must conform to the limits in 42 U.S.C. § 7410(a)(2)(D)(i)(I). The plain language of this provision precludes EPA from (1) prohibiting emissions that do not contribute significantly to nonattainment; (2) requiring emission reductions in amounts greater than necessary to achieve attainment; and (3) basing reduction requirements on emissions that never leave the upwind State and therefore can never reach the downwind-state nonattainment area. These statutory limits mean that a State can be required to prohibit no more than the amount of its total emissions that is transported to, and that contributes significantly to NAAQS nonattainment in, a downwind State. In promulgating the Transport Rule, EPA ignored these statutory boundaries.

A. The Transport Rule Is Statutorily Flawed in Three Distinct Respects.

The Transport Rule used a two-step approach in imposing good-neighbor ozone and $PM_{2.5}$ NAAQS emission reduction requirements. EPA first identified an air quality contribution threshold below which States could not be said to "contribute significantly" to nonattainment. 76 Fed. Reg. at 48,238-46 (Pet. App. 265a-309a). For each NAAQS, EPA made a finding in the rulemaking that a contribution of less than one percent of the NAAQS to any of the downwind nonattainment areas at issue "*do[es] not*

significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* at 48,236, 48,237 (Pet. App. 255a, 256a) (emphasis added).

After identifying the States that would be included in the multi-state program, EPA quantified the amount of emissions that each State must abate. Because good-neighbor emission reduction requirements must be "consistent with the provisions" of Title I of the CAA, the cost of emission controls may properly moderate the reduction amount needed to achieve good-neighbor air quality goals. See *supra* at 5-6 & n.1 (identifying numerous provisions of Title I that require consideration of cost and feasibility in limiting CAA nonattainment-based emission reduction obligations). Rather than using cost as a brake on required reductions in emissions contributing to air quality concentrations that exceed one percent of the NAAQS, however, EPA used cost as a license to compel reductions in emissions that contribute insignificantly to nonattainment, as well as to mandate emission reductions exceeding the amount required to achieve NAAQS attainment.[6]

The court of appeals found that, in adopting this approach, EPA exceeded its authority in "at least

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[6] The Brief of Industry and Labor Respondents (hereinafter Industry Br.) argues that EPA cannot consider costs in defining "significant contribution." This Court need not resolve whether, and, if so, how, costs may be considered under the good neighbor provision in order to affirm the court of appeals' vacatur of the Transport Rule. All respondents urging affirmance of the court of appeals' decision agree that requiring reductions in emissions that contribute insignificantly to nonattainment cannot, as a matter of law, be justified on cost or any other grounds.

three independent but intertwined" ways. Pet. App. 31a. Each of the discrete flaws that the court of appeals identified in the Transport Rule compels the conclusion that the rule must be vacated as contrary to clear congressional intent.

First, the court of appeals found that, under 42 U.S.C. § 7410(a)(2)(D)(i)(I), EPA had "no statutory authority to compel States to reduce amounts of pollution that are 'insignificant.'" *Id.* That is, the CAA "requires [an upwind] State to prohibit *at most* those 'amounts' which will 'contribute significantly'—and no more." *Id.* at 37a (emphasis added). Where "amounts below a numerical threshold do not contribute significantly to a downwind State's nonattainment, EPA may not require an upwind State to do more." *Id.*

The court of appeals properly found that EPA had exceeded its statutory authority. The good neighbor provision, the court noted, "is not a blank check for EPA to address interstate pollution on a regional basis without regard to an individual upwind State's actual contribution to downwind air quality." *Id.* at 23a. Once EPA promulgated a final rule finding that amounts below one percent of the relevant NAAQS "do not contribute significantly" to nonattainment, EPA could not require States to eliminate any emissions contributing below the one percent threshold.

The importance of administrative findings in determining the limits of an agency's statutory authority is illustrated by *Food & Drug Administration* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). In that case, the Court began its analysis with the observation that an agency "may not exercise its authority in a manner that is inconsistent

with the administrative structure that Congress enacted into law." *Id.* at 125 (internal quotation marks and citation omitted). The Court then considered the findings that the Food and Drug Administration (FDA) made to justify the regulation, but not the prohibition, of tobacco products. *Id.* at 135. ***Based on the agency findings***, the Court held that, if those products *were* within the regulatory ambit of the Food, Drug and Cosmetic Act (FDCA), the FDA would have to remove them "from the market entirely." *Id.* at 143. Thus, given the FDA's own findings, the only authority it could conceivably exercise under the FDCA would be authority to prohibit such products "entirely"—but, because Congress in subsequent legislation had rejected any such ban, "there [was] . . . no room for tobacco products within the FDCA's regulatory scheme." *Id.*

The Court's reasoning in that case applies here. Once EPA made the regulatory finding that emissions contributing to concentrations below the one percent threshold "do not significantly contribute to nonattainment," 76 Fed. Reg. at 48,236, 48,237 (Pet. App. 255a, 256a), the language of 42 U.S.C. § 7410(a)(2)(D)(i)(I) precluded EPA from regulating those emissions. Accordingly, any authority EPA has to require regulation of upwind States' emissions is necessarily constrained by EPA's own finding that amounts contributing below the one percent threshold do not significantly contribute. The Court's admonition in *Brown & Williamson* applies here: "[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop." 529 U.S. at 161 (internal quotation marks and citation omitted).

EPA offers no effective rebuttal to the court of appeals' determination that, once EPA had made a finding marking "a floor below which 'amounts' of downwind pollution were not significant," the Agency "could not then ignore that mark and redefine each State's 'significant contribution' in such a way that an upwind State's required reductions could be *more* than its own significant contribution to a downwind State." Pet. App. 36a (emphasis in original). EPA suggests that "[t]he court of appeals' analysis is misguided" and that "[t]he court did not suggest that the EPA had set out to regulate emissions that will contribute *in*significantly to downwind nonattainment, or even that the Transport Rule is likely to have that effect—only that the Rule does not eliminate that possibility." EPA Br. at 54 (emphasis in original). But regardless of whether EPA "set out to regulate" upwind emissions that do not contribute significantly to downwind nonattainment, under 42 U.S.C. § 7410(a)(2)(D)(i)(I) EPA is authorized only to require upwind-state prohibitions of emissions that create *significant* contributions.

Second, simple physics dictates—and EPA recognizes—that emissions originating in an upwind State, and the atmospheric products of those emissions, dissipate or deposit out of the atmosphere continually over time and distance. See, *e.g.*, 76 Fed. Reg. at 48,316 (Pet. App. 621a-622a). In disregard of this principle, however, the Transport Rule failed to discount the portion of the emissions that never leaves the upwind State and reaches downwind-state nonattainment areas.

The court of appeals thus held that the Transport Rule ran "afoul of the [CAA's] proportionality requirement as described in . . . *North Carolina*." Pet.

App. 38a. "Under the statute," the court explained, "each upwind State that contributes to a downwind nonattainment area is responsible for no more than its own 'amounts which will . . . contribute significantly' to the downwind State's pollution problem." *Id.* The Transport Rule, however, held each upwind State responsible for more than the emissions that traveled from the State to the downwind nonattainment areas at issue.

As the court of appeals observed, "the text of Section [7410(a)(2)(D)(i)(I)] tells us that the 'amounts which will . . . contribute' to a downwind State's nonattainment are *at most* those amounts that *travel beyond an upwind State's borders and end up in a downwind State's nonattainment area.*" *Id.* at 23a (emphases added). Yet EPA acknowledged to the court of appeals that under the Agency's construction of the good neighbor provision on which the Transport Rule rested, EPA "could require a State to reduce *more than the State's total emissions that go out of State.*" *Id.* at 38a n.23 (emphasis in original); see also *id.* at 23a n.12. "[S]uch a claim of authority," the court of appeals explained, "does not square with the statutory text—'amounts' of pollution obviously cannot 'contribute' to a downwind State's pollution problem if they don't even reach the downwind State." *Id.* at 38a n.23.

Here, EPA neither repudiates this claim of sweeping authority nor identifies any statutory foundation for it. Instead, EPA blandly asserts that "no basis [exists] for the court of appeals' concern that, under the EPA's approach, an upwind State could be required to 'reduce more than the State's total emissions that go out of State.'" EPA Br. at 48 n.14. "The pollution that travels beyond an upwind State's bor-

ders is not separate and distinct from the pollution with local impacts," EPA says, and "[t]he only way to reduce 100% of a State's contribution to a downwind area therefore would be to eliminate 100% of its emissions." *Id.* at 48-49 n.14.

This is a non sequitur. While the "pollution" in a downwind State that is attributable to emissions from an upwind State is thoroughly mixed with the "pollution" created from emissions originating in the downwind State, it does not follow from this that an upwind State's contribution is caused by all of the emissions originating in that upwind State. EPA's atmospheric modeling determines the "contribution" in a downwind State that is attributable to the "emissions" from an upwind State, see 76 Fed. Reg. at 48,239 (Pet. App. 265a), and those upwind-state emissions reaching the downwind State are a fraction of the upwind State's total emissions, see, *e.g.*, *id.* at 48,316 (Pet. App. 621a-622a) (reflecting the physical principle that pollutants deposit out of the atmosphere as emissions travel downwind).

Third, the court of appeals found that the Transport Rule was unlawful because EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet. App. 39a. Because "EPA's statutory authority . . . is limited to attaining the NAAQS in the downwind States[,] EPA [could] not require upwind States to do more than necessary for the downwind States to achieve the NAAQS." *Id.* at 39a-40a. In the Transport Rule, however, "EPA did not try to take steps to avoid such over control." *Id.* at 40a.

EPA does not dispute the court of appeals' reading of the statute. Rather, the Agency now suggests the court's "concern" was "theoretical and misplaced." EPA Br. at 50. As the Brief of Industry and Labor Respondents explains, EPA's after-the-fact explanations are unavailing; they are based on arguments that the Agency did not make below and that in any event the record contradicts. See Industry Br. at 18-20 (citing record evidence demonstrating over-control). As it is, the court of appeals recognized that, with "the end goal of the statute [being] attainment in the downwind State[,] EPA's authority to force reductions on upwind States ends at the point where the affected downwind State achieves attainment." Pet. App. 24a. Because, by its terms, the Transport Rule did not respect this statutory limitation on EPA's authority, the court properly found the rule to be unlawful.

B. The Court of Appeals Had Jurisdiction To Consider Statutory Objections to the Lawfulness of EPA's "Significant Contribution" Emission Reduction Requirements.

Petitioners argue that the court of appeals lacked jurisdiction under 42 U.S.C. § 7607(d)(7)(B) to declare EPA's Transport Rule emission reduction requirements contrary to the plain terms of the good neighbor provision because, they contend, rulemaking participants did not state with sufficient specificity what the statute means. EPA Br. at 33-42; Brief of American Lung Association, *et al.* (collectively, ALA), at 28-35. The respondents submitting this brief concur with the Brief of Industry and Labor Respondents that comments submitted in EPA's rulemaking by the Utility Air Regulatory Group (UARG),

Southern Company, and others raised statutory objections with sufficient specificity. See Industry Br. at 16, 47-48. The respondents submitting this brief further agree that the provisions of 42 U.S.C. § 7607(d)(7)(B) do not operate to limit the powers of a reviewing court.[7] See *id.* at 42-46. The respondents submitting this brief write separately to address the responsibility of the court of appeals under 42 U.S.C. § 7607(b) to determine whether the Transport Rule was consistent with clear statutory limits that Congress imposed on EPA and to explain further why 42 U.S.C. § 7607(d)(7)(B) cannot be construed to constrain the exercise of that jurisdiction.

Only by exercising its Article III power to interpret the law is a court able to review any agency decision. Because objections grounded in the Transport Rule's departure from the statute's terms were raised in the rulemaking, see Industry Br. at 16, 47-48; Comments of UARG at 64 (Oct. 1, 2010), EPA-HQ-OAR-2009-0491-2756, Deferred Joint Appendix, Vol. II at JA01060, *EME Homer City Generation, L.P.* v. *EPA*, No. 11-1302 (D.C. Cir. Mar. 14, 2012) (objecting to emission reduction requirements where EPA "fail[s] to adhere to the terms of the CAA"), the court below was obligated to decide whether the rule exceeded EPA's authority under the plain terms of the Act. To accept EPA's "waiver" arguments here

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[7] The Brief of Industry and Labor Respondents explains that although EPA and ALA assert that the court of appeals exceeded its jurisdiction in reaching the merits of the petitioners' arguments below, neither EPA nor ALA makes any effort to show that 42 U.S.C. § 7607(d)(7)(B) in fact establishes a "jurisdictional" requirement. See Industry Br. at 43. That brief demonstrates that the administrative exhaustion requirement in 42 U.S.C. § 7607(d)(7)(B) is nonjurisdictional. *Id.* at 43-46.

would require the Court to construe 42 U.S.C. § 7607(d)(7)(B) as a congressional shield that protects plainly ultra vires Agency action from judicial review in order to give repose to rules that exceed textual statutory limitations. Enshrining Executive Branch conduct that violates explicit legislative direction is hardly Congress's normal priority.

The CAA establishes for a court reviewing EPA FIPs under 42 U.S.C. § 7607(b) the obligation to "reverse any such action found to be . . . in excess of statutory jurisdiction, authority, or limitations." 42 U.S.C. § 7607(d)(9);[8] cf. 5 U.S.C. § 706(2)(C) (judicial review provision of the Administrative Procedure Act (APA)).[9] This is what the court of appeals did here. It determined, under *Chevron* step one,[10] that the Transport Rule failed as a matter of law in three independent respects.

In this regard, this Court's discussion of the fundamental purpose of the "administrative exhaustion" doctrine, and of the values that the doctrine is meant to promote, provides context for determining whether, as petitioners' arguments assume, 42 U.S.C. § 7607(d)(7)(B) contemplates that rulemaking participants can themselves "waive" statutory limits on EPA's powers. In *McCarthy* v. *Madigan*, 503 U.S.

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[8] 42 U.S.C. § 7607(d)(1)(B) makes FIPs, including those promulgated by EPA in the Transport Rule, subject to the provisions of 42 U.S.C. § 7607(d).

[9] See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 519 (D.C. Cir. 1983) ("The standard for substantive judicial review of EPA action under the Clean Air Act is taken directly from the APA.").

[10] *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

140, 145 (1992), the Court explained that "the exhaustion doctrine recognizes the notion, grounded in deference to Congress' delegation of authority to coordinate branches of Government, that agencies, not the courts, ought to have primary responsibility for the programs that Congress has charged them to administer." This principle requires application of the exhaustion doctrine "when the action under review involves exercise of *the agency's discretionary power* or when the agency proceedings in question allow the agency to apply *its special expertise*." *Id.* (citing *McKart* v. *United States*, 395 U.S. 185, 194 (1969) (emphases added)). Where, however, there is "*nothing to be gained* from permitting the compilation of a detailed factual record, or from [the application of] agency expertise," *Bowen* v. *City of New York*, 476 U.S. 467, 485 (1986) (emphasis added), the rationale for requiring "exhaustion" before the agency disappears.

Consistent with the principles that underpin the exhaustion doctrine, the court of appeals properly addressed the statutory limits on EPA's "significant contribution" rulemaking authority as an element of the court's inherent powers as a reviewing court. Because, as the court of appeals found, the good neighbor provision is unambiguous regarding the three statutory limits on EPA's authority, EPA had no "discretionary power" to exercise or "special expertise" to apply in determining whether to obey those limits. The issues here were pure questions of law not requiring application of EPA's expertise. See *Marbury* v. *Madison*, 5 U.S. 137, 177 (1803) (interpreting the law is "the province and duty of the judicial department").

Indeed, given these circumstances, had the court of appeals *declined* to reach issues related to the limits on EPA's statutory authority, the court would have abdicated its responsibility under 42 U.S.C. § 7607(d)(9)(C) to "reverse any [EPA] action found to be . . . in excess of statutory jurisdiction, authority, or limitations." This past Term, the Court had occasion to note that, "for agencies charged with administering congressional statutes[,] [b]oth their power to act and how they are to act [are] authoritatively prescribed by Congress." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1869 (2013). Accordingly, when such agencies "act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires." *Id.*

The implications of petitioners' assertion that 42 U.S.C. § 7607(d)(7)(B) deprived the court of appeals of jurisdiction to consider whether EPA acted within the scope of its congressionally delegated authority are breathtaking. The asserted principle that EPA advances would discharge agencies from obeying clear statutory commands and would bar reviewing courts from exercising their constitutional and statutory responsibilities whenever agencies might claim that rulemaking comments failed to recite a statute's plain meaning.

At issue here was a straightforward question of statutory interpretation, involving a provision of the CAA that the court below found *not* to be ambiguous. Objections were raised during the rulemaking to the exercise of EPA's "significant contribution" emission reduction authority; EPA was not "subjected to verbal traps" or required "to wade through reams of documents searching for "'implied" challenges.'" *Natural Res. Def. Council* v. *EPA*, 559 F.3d 561, 564

(D.C. Cir. 2009) (quoting *Mossville Envtl. Action Now* v. *EPA*, 370 F.3d 1232, 1239 (D.C. Cir. 2004)).

To the contrary, as the majority below pointed out, "one of the central questions in the long history of EPA's efforts to implement the good neighbor provision has been whether EPA has complied with the basic statutory limits on its authority." Pet. App. 32a n.18. EPA thus, for example, "knew from the beginning [of the rulemaking here] that it was required to comply with *North Carolina*, including that part of the [court of appeals'] holding on which petitioners rel[ied]" in challenging the Transport Rule. *Id.* Because the statutory provisions construed by the court below were *not* ambiguous, the *Chevron* framework removes all deference to the agency. As the court of appeals has stated, "at *Chevron* step one [the reviewing court] alone [is] tasked with determining Congress's unambiguous intent," and the court is therefore to "answer [the] inquir[y] without showing the agency any special deference." *Vill. of Barrington* v. *Surface Transp. Bd.*, 636 F.3d 650, 660 (D.C. Cir. 2011).

EPA was obligated, in developing its Transport Rule emission reduction requirements, to assure that statutory limits imposed on the exercise of the Agency's good-neighbor powers would not be crossed. Because EPA ignored those limits, the court of appeals' obligation under 42 U.S.C. § 7607(d)(9)(C) was to vacate the Transport Rule.[11] Accepting petitioners'

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[11] Other D.C. Circuit decisions recognize EPA's independent obligation to justify "key assumptions as part of its affirmative 'burden'" to promulgate valid rules, *Small Refiner*, 705 F.2d at 534-35, and recognize that "even the failure to object during the comment period is insufficient to bar [judicial] review" of those key assumptions. *S. Coast Air Quality Mgmt. Dist.* v. *EPA*, 472

view of the statute would enshrine outcomes that Congress explicitly precluded under statutory provisions that, on their face, give EPA notice of the limits on its authority. That is not the law.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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F.3d 882, 891-92 (D.C. Cir. 2006), *clarified on other grounds on denial of reh'g*, 489 F.3d 1245 (D.C. Cir 2007); see *Small Refiner*, 705 F.2d at 535. This principle has been applied to arguments, made in challenges to EPA actions under the CAA, that EPA failed (1) to set compliance deadlines consistent with the CAA, *Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 817-18 (D.C. Cir. 1998) (per curiam), (2) to promulgate rules consistent with the requirements of 42 U.S.C. § 7607(d), *Ne. Md. Waste Disposal Auth.* v. *EPA*, 358 F.3d 936, 948 (D.C. Cir. 2004) (per curiam), and (3) to establish the validity of important modeling assumptions, *Small Refiner*, 705 F.2d at 534-35—notwithstanding claims in each case that those arguments were not raised in comments.

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AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

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Petitioners American Lung Association, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club have no parent companies. Nor have any of them issued publicly held stock.

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INTRODUCTION

EPA designed the Transport Rule to conform to statutory requirements and to a recent D.C. Circuit decision pronouncing the agency's predecessor rule too lax and slow in achieving congressionally-mandated pollution reductions. The record shows that EPA strove to provide downwind States timely relief while limiting compliance burdens for upwind States. As our opening brief demonstrated, the decision vacating the Rule contravened basic norms of judicial review.

Respondents' effort to defend the court of appeals' "red lines" fails. They offer no reason—let alone any basis in statutory text—for believing that Congress intended the rules imposed by the panel majority below. On the contrary, those "rules" are unworkable; they reflect a fundamental misunderstanding of the problem and the realities of the electric generating sector; they contravene Congress's expressed preferences for efficiency and trading rules; and they achieve less pollution reduction at far greater cost. Indeed, the only thing the decision below would reliably accomplish would be to further postpone required relief for downwind States and millions of their residents, in an area of Clean Air Act administration already marked by chronic delay and under-enforcement. There is nothing in the statute—certainly not in the word "amounts"—that mandates a specific approach to allocating responsibility among joint upwind contributors or forecloses EPA's equity- and efficiency-promoting approach. Nor is there any merit to the objection some respondents now advance (but did not present to the agency or the

court below), based on a fundamentally mistaken analogy to *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

Also unavailing are the State respondents' highly abstract federalism arguments—all rooted in a supposed "right" to advance notice of federal requirements applicable only to States that have already failed to abate interstate pollution. As a practical matter, the demands the Transport Rule makes of sources in upwind States are modest; these States' claims of helplessness in the absence of a predicate EPA rule are overstated; and even if States had a strong interest in creating their own plans in this context, they already enjoyed the right and opportunity to do so and remain able to replace federal plans with SIPs.

State respondents misunderstand the text and aims of the Good Neighbor provision and of the agency's role vis-à-vis the States. Their appeals to federalism come at the expense of contrary, plain statutory language, which directs EPA to act if States do not—and of this Court's precedent, which recognizes EPA's authority and responsibility to do so. They also ignore the need for *timely* relief for downwind States in order to comply with *statutory* attainment deadlines—an imperative that the D.C. Circuit, in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), on reh'g, 550 F.3d 1176 (D.C. Cir. 2008), emphasized in remanding CAIR with pointed instructions to replace it expeditiously. Respondents' arguments overlook that when EPA acts, it does so on behalf of downwind States that, in the federal system, cannot protect their own

interests. See *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 236-38 (1907).

The practical effect of the Transport Rule is to require electric generating units in States that contribute to neighboring States' air quality problems to operate pollution controls that are already in widespread use throughout much of the country. The Rule's modest requirements (in most instances, requiring abatement only of pollution that can be eliminated for $500 per ton or less) represent a small fraction of the effort that is being exerted in many downwind States struggling with attainment problems. A State that requires its sources to install widely used, cost-effective controls—or merely requires sources to operate pollution controls already in place—has generally satisfied its neighborly duties under EPA's approach.

What the majority below called a "narrow and limited" provision is, in fact, the Act's central remedy for a serious problem—interstate pollution—that not only harms public health, but also confounds the Act's State-focused system for implementing health-based air quality standards. That problem was a key concern of Congress when it enacted and amended the Act to include a robust and flexible measure to protect downwind States and their residents. EPA has reasonably implemented the Good Neighbor provision here.

I. RESPONDENTS' ATTACKS ON EPA'S METHODOLOGY ARE MERITLESS

A. The Act Does Not Prohibit EPA from Taking Account of Control Costs in Apportioning Abatement Responsibilities Among States that Contribute to Interstate Pollution Problems

Certain respondents now claim, for the first time, that the Act prohibits EPA from considering control costs in determining States' Good Neighbor obligations. Brief of Industry and Labor Respondents 22-36 ("I/L Br."). They did not present that objection during the rulemaking—instead they remained mum about this putative fundamental flaw while the agency and scores of stakeholders embarked upon a massive administrative proceeding to implement a D.C. Circuit mandate and address problems affecting a sizeable portion of the country. Respondents' briefs in the D.C. Circuit (and briefs in opposition) did not even cite *American Trucking*, which they accuse *petitioners* of "largely ignoring." I/L Br. 25. While respondents told the D.C. Circuit they were "*not* advocating an 'air quality-only' approach," Industry/Labor C.A. Reply Br. 10 (emphasis added), they now claim the statute mandates such an approach, see I/L Br. 23.

Respondents' new position—that the Act compels EPA to disregard differences in control costs in different States—contradicts six Administrations' consistent understanding of the 1977 and current versions of the Good Neighbor provision. See Institute for Policy Integrity Amicus Brief 17-20 ("IPI Amicus"). It would condemn all of EPA's regional transport rules and prohibit the agency

from developing rules in a way that is effective but that also reduces burdens on sources in upwind States. See Brief of Respondent Utility Air Regulatory Group 28 n.6 (separate brief of electric utility trade association, declining to support other industry respondents' position) ("UARG Br.").

Belatedness, procedural irregularity, and dramatic consequences aside, respondents' argument is without merit. EPA's use of cost thresholds in the Transport Rule bears no resemblance to what was rejected in *American Trucking*. There, the Court considered "whether implementation costs should moderate national air quality standards," 531 U.S. at 468, promulgated under Section 109(b) of the Act, which requires EPA to set standards at a level "requisite to protect the public health" with an "adequate margin of safety," 42 U.S.C. 7409(b). Approving longstanding D.C. Circuit precedent that economic considerations "play no part in the *promulgation* of ambient air quality standards," 531 U.S. at 464 (quoting *Lead Indus. Ass'n v. EPA*, 647 F.2d 1130, 1148 (D.C. Cir. 1980)) (emphasis added), *American Trucking* "held that the text of § 109 of the Clean Air Act, 'interpreted in its statutory and historical context ... unambiguously bars cost considerations' in setting air quality standards under that provision." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) (quoting *American Trucking*, 531 U.S. at 471).

In contrast, here EPA is not *setting* health standards, but rather providing a mechanism to allow downwind States to attain and maintain those standards (including the 1997 ozone NAAQS upheld long ago in *American Trucking*) after upwind States

have failed to act on their own. As *American Trucking* observed, implementing standards "intelligently" would be "impossible ... without considering which abatement technologies are most efficient, and most economically feasible." 531 U.S. at 470. Under the Transport Rule (as under the predecessor rules), the agency's consideration of relative pollution abatement costs operates not to weaken health-based standards, but as a means for allocating clean-up responsibilities among jointly responsible parties. EPA never claimed any "general authority" to impose whatever emission reductions it finds to be efficient. I/L Br. 1. The agency's methodology, instead, seeks to remedy demonstrated interstate pollution problems in a carefully calibrated manner. See Pet.App. 349a-351a; Brief for Petitioners American Lung Association, *et al.*, 42-45 ("ALA Br.").

The Good Neighbor provision requires that "each implementation plan submitted by a state" contain "adequate" provisions concerning interstate pollution, 42 U.S.C. 7410(a)(2), but does not specify how States or EPA are to determine States' relative obligations when the emissions from multiple States (and sources in downwind States) contribute to downwind air quality problems. *Cf. Entergy*, 556 U.S. at 222 (statute was "silent" as to factors agency could consider in selecting "best" control technology).[1] Congress has not "directly spoken to

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[1] Respondents insist the word "amounts" prohibits EPA from considering cost in determining abatement obligations, I/L Br. 28, 31; see also Pet.App. 41a. But the instruction that plans must prohibit "amounts" of pollution from "source[s]" or "emissions activity," 42 U.S.C. 7410(a)(2)(D)(i)—requirements

th[is] precise question," and EPA's approach is "based on a permissible construction of the statute." *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) ("as a general rule, agencies have authority to fill gaps where the statutes are silent").

Numerous features of the text confirm EPA's discretion to craft a workable approach that reasonably balances upwind and downwind States' respective obligations. A State's plan provisions concerning interstate pollution must be "adequate." 42 U.S.C. 7410(a)(2)(D). When reviewing such plans, this at least allows EPA to decide whether measures will be effective and administrable, and the use of the future tense, *id.* 7410(a)(2)(D)(i) ("will ... contribute"), recognizes the role of predictive judgments concerning emissions and air quality. As the D.C. Circuit emphasized in disapproving CAIR, the requirement that interstate pollution plan provisions be "consistent with" the other provisions of Subchapter I, 42 U.S.C. 7401-7515, requires, *inter alia*, that upwind States' Good Neighbor obligations reflect the statutory attainment deadlines that downwind States must satisfy. See *North Carolina*, 531 F.3d at 911-12. And, as the same court emphasized in upholding the NO_x SIP Call, the phrase "contribute significantly" supports agency authority to consider compliance costs. *Michigan v. EPA*, 213 F.3d 663, 677-78 (D.C. Cir. 2000); ALA Br. 35-36.

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the Rule indisputably satisfies—does not address how those "amounts" are to be determined.

That Section 7410(a)(2)(D) addresses inter*state* relations makes the industry respondents' position especially implausible. *Any* allocation of abatement responsibilities necessarily bears upon the interests of both the affected upwind and downwind States. The economic and competitive inequities caused by interstate pollution were a central impetus for the Good Neighbor provision, see ALA Br. 8-9 (discussing 1977 amendment), and by the time the provision took its current form in 1990, EPA had long interpreted the predecessor provision to allow consideration of abatement costs. See IPI Amicus 17-20 & n.6; *cf. Zuni Pub. School Dist. v. Dep't of Educ.*, 550 U.S. 81, 90-91 (2007) (upholding agency interpretation left intact by subsequent legislation).[2]

Cost thresholds measure incremental pollution control effort; they take into account how difficult it would be for States contributing to downwind pollution (some of whom may have already imposed relatively stringent control requirements) to achieve emissions reductions within the time needed to facilitate attainment in downwind States. See ALA Br. 44 (noting that control effort required under different States' regulations can differ greatly); Brief for New York, *et al.* 8 & n.6. It is profoundly implausible that Congress meant silently to forbid EPA from considering the burdens that different

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[2] EPA construed the "prevent attainment" standard under the 1977 amendments to apply when upwind States made a "significant contribution" to downwind nonattainment and applied a multi-factor analysis that included "the relative costs of pollution abatement between sources that contribute to a violation." 49 Fed. Reg. 34,851, 35,859 (Sept. 4, 1984); 49 Fed. Reg. 48,152, 48,156 (Dec. 10, 1984) ("relative cost of pollution abatement among contributing sources"). See IPI Amicus 18.

abatement requirements would impose upon States. See *Michigan*, 213 F.3d at 678-79. Respondents have not met their burden to demonstrate that Congress intended to impose strictures with these jarring consequences.

The Act insists upon timely achievement of air quality standards, but also evinces congressional concern with reducing the cost of achieving those standards. See *American Trucking*, 531 U.S. at 467. Congress's express authorization, as part of the 1990 amendments, of the use of "economic incentives," including "marketable permits" in both state and federal implementation plans, 42 U.S.C. 7410(a)(2)(A); *id.* 7602(y), provides an example of this concern. The central objective of such measures is to facilitate least-cost approaches to achieving emissions reductions. See IPI Amicus 14-16 (minimizing implementation costs is the "whole point of authorizing trading"). The Transport Rule's structure and its provisions for trading further these congressional objectives. See Brief of Respondents Calpine Corp. and Exelon Corp. in Support of Petitioners 12-15, 38-40 ("Calpine/Exelon Br.").

EPA's methodology rested upon ample experience, including extensive consultation with affected States and interstate organizations. See ALA Br. 11-12; IPI Amicus 16-20. When regulating power plants selling electricity into regional wholesale markets, consideration of cost is critical to ensuring that the desired air quality results are achieved. See, *e.g.*, Pet.App. 384a (EPA discussing emissions leakage); Calpine/Exelon Br. 10-11, 32-33; Amicus Brief of Benjamin F. Hobbs, *et al.* 24-31. The Rule is carefully fitted to the operational

realities of the electric generation sector, which is marked by production that shifts rapidly from plant to plant based largely upon changes in operating costs (including pollution control costs). See Calpine/Exelon Br. 16-26, 32-33. Particularly with such "technical, complex, and dynamic" problems, *NCTA*, 534 U.S. at 339, agencies may make "policy choices" and take account of "everyday realities," *Chevron*, 467 U.S. at 865-66.

EPA examined alternative approaches, including various versions of "air quality only" approaches that some respondents suddenly purport to favor. See C.A.App. 2306-20. As EPA explained, the effect of adopting an "air quality only" approach would be to require extremely large reductions in certain States. See C.A.App. 2310 (table indicating total State-wide NO_x and SO_2 emissions would require reductions from *all* sources of 76% in Indiana; 75% in Ohio; 70% in Kentucky; and 69% in Pennsylvania); C.A.App. 2030. No participant in EPA's rulemaking advocated any of those approaches or questioned the soundness of the agency's reasons for rejecting them. See ALA Br. 30; Primary Response to Comments at 733-34 (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513 (addressing comments concerning alternative approaches). Respondents provide no reason, let alone a statutory one, to disturb EPA's judgment now.

B. Respondents' Arguments Would Annul the Clean Air Act's Exhaustion Requirement and Undermine the Administrative Process

The court of appeals' central rulings sustained objections not raised during the administrative process, bypassing the express statutory exhaustion

requirement that undergirds the integrity of the administrative process. ALA Br. 28-35; Brief of Petitioner EPA 34-42 ("EPA Br."); see Amicus Brief of Law Professors on Issue Exhaustion 7-9 ("Law Professors' Amicus"). Respondents' rejoinders lack merit.

Respondents seek to evade Section 7607(d)(7)(B); denying its importance for the Act's carefully drawn judicial review regime. Their suggestion that statutory claims need not be exhausted, UARG Br. 35-39, would create a gaping exemption to Section 7607(d)(7)(B)'s categorical language; contradicts precedent, see, *e.g.*, *Cement Kiln Recycling Coalition v. EPA*, 255 F.3d 855, 860 (D.C. Cir. 2001); and would upend judicial review under *Chevron*, which ensures that statutory ambiguities will be first resolved "not by the courts but by the administering agency," *City of Arlington*, 133 S. Ct. at 1868; see *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2539 (2011). The submission that courts are free to entertain unexhausted *non-procedural* objections, I/L Br. 44, is contrary to the letter and purposes of the exhaustion provision.

Respondents also suggest that, regardless of whether the exhaustion requirement was met, this Court should proceed to address the merits issues since the D.C. Circuit ruled on them. I/L Br. 53-54. But that approach would undermine an important, structural feature of the Act and ill serve Congress's pointed insistence on the importance of exhaustion in rulemaking under the Act. It also would invite parties to "sandbag" the agency and other interested parties by withholding objections during the administrative process, then presenting them in

court. Law Professors' Amicus 14. At the very least, if the Court does address the merits, it should not, as respondents do, fault the agency for its "failure" to answer objections that were not made. See, *e.g.*, I/L Br. 20-21, 40 (citing *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and urging the Court to disregard EPA's responses to their unexhausted arguments).[3]

C. The Court of Appeals' "Red Lines" Are Not Statutory Requirements

Respondents' efforts to defend the D.C. Circuit majority's "red lines" only emphasize the degree to which the court departed from settled standards for reviewing agency action.

Collective Overcontrol. In their unidirectional focus on "overcontrol," I/L Br. 16-22; UARG Br. 18, respondents ignore the Good Neighbor provision's central mandate to prohibit pollution that impedes other States' ability to meet each of the health-based national air quality standards. These standards are the core of the Act, and violation of them causes thousands of avoidable deaths and serious illnesses each year. ALA Br. 51-52; Amicus Brief of American Thoracic Society 21 ("ATS Amicus"). When confronted with a regional air pollution problem, EPA must—as it did here—craft a rule that balances

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[3] Respondents have unearthed no comments making the relevant objections. See I/L Br. 50-51. Tennessee's comment claims no statutory violation and attests that "the [Rule's] emissions reductions ... are necessary in order for Tennessee and other States to attain and maintain compliance with the [applicable] NAAQS." C.A.App. 556. Neither it, nor Wisconsin's comment, C.A.App. 1293, raises the one percent threshold objection with "reasonable specificity," 42 U.S.C. 7607(d)(7)(B).

the prospect of "overcontrol" against that of "undercontrol."

Respondents allege that "[t]he record shows that EPA massively overcontrolled," I/L Br. 18, when, in fact, it shows that the Transport Rule falls short of resolving all the $PM_{2.5}$ and ozone nonattainment and maintenance problems in the covered region. See EPA Br. 53. Respondents disregard these persistent problems and premise their overcontrol argument on metrics such as air quality averaged across *all* downwind receptors and air quality at the "substantial *majority* of locations." I/L Br. 18. These metrics have no statutory basis and are contrary to Congress's directive that *every* State must achieve the health-based national air quality standards within statutory deadlines—or earlier if practicable. See 42 U.S.C. 7410(a)(1), 7502(a)(2)(A), 7511; see also *Union Electric Co. v. EPA*, 427 U.S. 246, 249 (1976); *North Carolina*, 531 F.3d at 911, 930.

Just before arguing that the Act prohibits consideration of cost, industry respondents' brief faults EPA for not adopting *lower* cost thresholds, though lower thresholds would have resulted in more locations with residual attainment problems. I/L Br. 16. Moreover, they point to EPA's projections for *annual* $PM_{2.5}$ air quality levels in 2014 as evidence of "massive overcontrol," *id.* at 18, while disregarding the Transport Rule's "undercontrol" for the *24-hour* $PM_{2.5}$ standard. See, *e.g.*, C.A.App. 2965 (showing post-remedy 24-hour $PM_{2.5}$ nonattainment and maintenance problems in several counties). The two $PM_{2.5}$ standards are directed at different types of exposure (chronic versus acute) to the same pollutants, with the same precursors. (NO_x is a

precursor for all three NAAQS at issue here.) The additional emissions reductions necessary to ensure attainment of the daily $PM_{2.5}$ NAAQS also reduce predicted levels of $PM_{2.5}$ measured annually. See Atmospheric Scientists and Air Quality Modeling Experts Amicus Brief 28 ("Atmospheric Scientists Amicus"). "Undercontrolling" for daily $PM_{2.5}$ to avoid "overcontrolling" for annual $PM_{2.5}$ would violate the Act's directive that *all* air quality standards be timely attained.

Respondents also claim that an upwind State is "overcontrolled" if the sole downwind location to which it is linked for the purpose of triggering inclusion in the program will attain and maintain the NAAQS based upon the projected Good Neighbor reductions of other upwind States. See I/L Br. 19. But the Transport Rule's projected air quality benefits for Madison, Illinois, for example, do not result from Texas's being "overcontrolled," but rather are incidental benefits from the cumulative emissions reductions made by Texas's co-contributors acting simultaneously to enable timely NAAQS compliance. See Atmospheric Scientists Amicus 28. The statute's text does not support giving certain upwind States an exemption in these circumstances. See also 42 U.S.C. 7410(a)(2)(D)(i) ("[e]ach" state plan must contain "adequate" provisions "prohibiting" "any" source or emissions activity that contributes significantly to downwind air quality problems). Moreover, given that States have the primary Good Neighbor obligation, respondents' approach would provide each upwind State with an incentive (indeed a legal basis) to omit Good Neighbor protections from its State plan while relying on other States to fix problems to which they

all contribute. See Thomas W. Merrill, *Golden Rules for Transboundary Pollution*, 46 Duke L.J. 931, 975 (1997) (describing "holdout" and "free-rider" problems inherent in the interstate pollution problem); see also EPA Br. 4-5 (describing amendments to Good Neighbor provision to address contributions from multiple sources).

Finally, respondents rely on extra-record ozone and $PM_{2.5}$ data from 2009-2011 to argue that the Transport Rule's reductions are not necessary to achieve downwind attainment of the NAAQS. I/L Br. 20. Even if these data were properly before the Court, more recent EPA data refute the assumption of a persistent improving air quality trend that obviates the need for further federal action. See ATS Amicus 24-26.

One Percent Threshold. Contrary to respondents' claims, I/L Br. 13, 38; UARG Br. 31, EPA did not present its one percent threshold as the agency's "definition" of "significant contribution." Had that been so, EPA would have had a statutory obligation to require States to "prohibit[]" *all* contributions above one percent, see 42 U.S.C. 7410(a)(2)(D)—a position EPA did not take, and which respondents do not advocate. See C.A.App. 2309-10 (discussing extreme consequences of fixed air quality threshold approaches). Instead, EPA defined significant contributions by the entirety of its two-step analysis. Pet.App. 350a-351a. Assuming, contrary to the evidence, that the Transport Rule *did* reduce some States' emissions below the initial screening threshold, the statute would not be violated. Nor is there any principle of law or logic that requires a regulator, having

established a coverage threshold (*e.g.*, tons of pollution emitted, number of persons employed), to grant exclusions to entities for the portion of their action that falls below the threshold.

Proportionality. Respondents make no serious attempt to defend what the court of appeals called "the statute's proportionality requirement." Pet.App. 38a-39a. This is no surprise, because the purported statutory "red line" has no textual basis and indeed is outright *impossible* under the real-world conditions EPA confronted, which involve multiple upwind States contributing to air pollution problems in multiple downwind States. See ALA Br. 39-40; EPA Br. 45-50; Calpine/Exelon Br. 47-51; Atmospheric Scientists Amicus 26-27; C.A.App. 2311-12.

Respondents attempt to diminish the centrality of the proportionality requirement to the decision below by citing the court's statement that EPA has "some discretion about how to reasonably avoid such over-control." I/L Br. 34; quoting Pet.App. 29a. If the court's "red lines" were indeed statutory requirements, it is unclear what the basis for such flexibility would be. Regardless, the majority's proviso addressed not the proportionality requirement, but "over-control," an issue that industry respondents recognize is "independent," "distinct," and "separate[]" from proportionality. Industry Brief in Opp. 24; see also Pet.App. 25a, 27a, 29a. The court's "proportionality requirement" has no basis in the statute and departed from foundational principles of judicial review. See ALA Br. 39-40.

II. THE COURT OF APPEALS ERRED IN BARRING EPA FROM ISSUING FEDERAL IMPLEMENTATION PLANS

A. Section 7410(a) Places an Initial, Achievable Responsibility upon Each State to Develop a Good Neighbor Plan

The Act expressly requires "each state" to submit, within three years after promulgation of any new or revised NAAQS, a SIP addressing its Good Neighbor obligations, 42 U.S.C. 7410(a)(1); 7410(a)(2)(D)(i)(I). If EPA finds that a State has not submitted a plan within three years, or that a State submission is inadequate, EPA must within two years promulgate a FIP addressing the Good Neighbor obligations. *Id.* 7410(c)(1), 7602(y). As our opening brief demonstrated, respondents and the panel decision err by inserting an extra-statutory requirement that EPA quantify Good Neighbor obligations before a State's obligation to propose a transport plan is triggered. See ALA Br. 48-51, 59; Brief for New York, *et al.* 24. See also *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 548 (1978) (reviewing court not empowered to impose procedures not required by statute).

Lacking a textual rejoinder, respondents condemn petitioners for "dogmatically" invoking the statute's words. Brief for the State and Local Respondents 43, 44 ("Texas Br."). But "[w]hen the words of a statute are unambiguous, then ... judicial inquiry is complete." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (citations and internal quotation marks omitted).

Under the express terms of Section 7410(a), a State's Good Neighbor obligation is triggered when a NAAQS is promulgated under Section 7409. Each State has an obligation to secure the health benefits of NAAQS attainment for its residents, 42 U.S.C. 7410(a)(1), and to ensure its pollution sources do not prevent the residents of downwind States from realizing those same benefits, *id.* 7410(a)(2)(D)(i). In doing so, a State may propose its own mechanism for ensuring its Good Neighbor obligations are met. See *Train v. NRDC*, 421 U.S. 60, 79 (1975). States do not need EPA to define their minimum duties before they can act, and the statute does not create any such condition precedent.

Many of the respondent States have previously stated that the Good Neighbor provision is "not ambiguous as to the division of authority—EPA sets *national* air quality standards and the States have the responsibility ... to prevent significant contribution to nonattainment in other States," State Pet. Br., *Michigan v. EPA*, D.C. Cir. No. 98-1497, at 35, and that "EPA's role is to determine whether the SIP submitted is 'adequate' to reduce significant contribution to nonattainment of the NAAQS in another State, not to dictate contents of the submittal in the first instance," *id.* at 37.[4]

Respondents now complain that compliance with Good Neighbor requirements is impossible unless EPA first quantifies their obligations. Texas Br. 56. Their protestations ignore both the nature of the Good Neighbor obligation and the reality of

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[4] Respondents Alabama, Indiana, Michigan, Ohio, South Carolina, Virginia and amicus West Virginia joined the brief.

independent State compliance. The statute does not require a State to determine the Good Neighbor obligations of its sister States. A State need only present a plan that addresses emissions from sources and other activities within its own borders that affect air quality in downwind States, 42 U.S.C. 7410(a)(2)(D)(i). In practice, a State requiring that in-state sources install and use commonly-available pollution control equipment is unlikely to incur further responsibilities given EPA's assessment of significant contribution in regional rulemakings. See, *e.g.*, 76 Fed. Reg. 2853, 2856 (Jan. 18, 2011) (proposing approval of Delaware transport SIP, which required power plants and industrial boilers to use best available control technology); 76 Fed. Reg. 56,368 (Aug. 29, 2011) (final approval). Nor are States incapable of conducting their own transport analyses. See, *e.g.*, 78 Fed. Reg. 45,457, 45,458 (July 29, 2013) (noting North Dakota's submittal of its own transport analysis); 78 Fed. Reg. 40,966, 40,967 (July 9, 2013) (same for New Mexico); see also ALA Br. 56 & n.24.

As amicus notes, States have the best information regarding emissions from sources within their boundaries. Amicus Brief of West Virginia, *et al.* 13-14 ("W. Va. Amicus"). They regularly undertake air quality modeling to demonstrate the effect of their emissions on ambient air quality. 42 U.S.C. 7410(a)(2)(K); see also Atmospheric Scientists Amicus 17 & n.5. Moreover, States demonstrate that upwind air pollution sources prevent them from achieving or maintaining attainment. See, *e.g.*, *North Carolina*, 531 F.3d at 909 (North Carolina noted difficulty maintaining NAAQS due to upwind sources). In reviewing timely Good Neighbor SIPs,

EPA asks only that States use available information, not that they solve the entirety of regional air quality problems. See EPA, Guidance on SIP Elements Required Under Sections 110(a)(1) and (2) for the 2006 24-Hour Fine Particle ($PM_{2.5}$) [NAAQS] (Sept. 2009) (available at http://www.epa.gov/ttn/caaa/t1/memoranda/20090925_harnett_pm25_sip_110a12.pdf).

EPA's obligation to issue a rule quantifying a State's significant contribution or interference with maintenance arises only after a State has failed to submit a transport plan, or submits an inadequate plan. 42 U.S.C. 7410(c). If EPA approves a state plan that subsequently proves inadequate based on later-arising information, EPA can *at that* time invoke its authority under a different part of Section 7410—*i.e.*, the "SIP Call" provision, *id.* 7410(k)(5)—and request that States submit revised plans to address those inadequacies. Indeed, this is what EPA did in the NO_x SIP Call, 63 Fed. Reg. 57,356, 57,367 (Oct. 27, 1998), and is the approach used here to address interstate transport of ozone from Kansas when Transport Rule modeling revealed impacts that were not being addressed under Kansas's previously approved SIP, 76 Fed. Reg. 80,760, 80,766 (Dec. 27, 2011).

B. The Court of Appeals Exceeded Its Jurisdiction by Reviewing Previously Issued EPA Triggering Findings Not Properly Before It

The panel's direct attacks on EPA's triggering findings exceeded its jurisdiction in violation of Section 7607(b)(1). Respondents do not disavow the panel's rulings that SIPs "*cannot* be deemed to lack a

required submission" and "*cannot* ... be deemed deficient," Pet.App. 48a (emphasis added), if EPA has not previously quantified emissions reductions requirements. See Texas Br. 39-40, 52.

Nonetheless, respondents claim to accept EPA's prior SIP findings and to challenge not *whether* EPA may issue any FIP, but only *what kind* of FIP EPA may issue. *Id.* at 20-21; *id.* at 61 (suggesting FIP based on CAIR budgets). But if EPA must first quantify emissions reductions, no type of FIP *could* ever be lawful—let alone here, where a FIP implementing CAIR budgets already held unlawful in *North Carolina* would contravene the duty and "explicit deadline[]" established by Section 7410(c). See *Gen. Motors Corp. v. EPA*, 496 U.S. 530, 537 (1990).

Respondents suggest that EPA issue a "SIP Call" under Section 7410(k)(5), see Texas Br. 20, but that provision provides for revisions to an "applicable implementation plan." See 42 U.S.C. 7410(k)(5); *id.* 7602(q). For the 2006 NAAQS, no such plans existed. For the 1997 NAAQS, the protracted process of issuing a SIP Call, waiting for a State response, and, if needed, promulgating a second Section 7410(c) finding, would drain the current Section 7410(c) findings of effect. This approach would flout the D.C. Circuit's call for timely action to replace CAIR, *North Carolina*, 550 F.3d at 1178, and its mandate that Good Neighbor plans conform to the Act's deadlines for NAAQS compliance, 531 F.3d at 912.

Respondents insist they did not seek to *vacate* the triggering findings, Texas Br. 21; UARG Br. 20, but because any nonsubmittal or insufficiency

finding triggers an obligation to issue a FIP within two years, 42 U.S.C. 7410(c), the panel's ruling that EPA cannot (yet) issue a FIP denies those findings their legal significance—*i.e.*, as triggering a time-limited obligation to issue a FIP. See *NRDC v. Browner*, 57 F.3d 1122, 1124 (D.C. Cir. 1995) ("FIP promulgation can be avoided only if EPA has actually approved the state's SIP submission").

Respondents are left to argue that they may pursue a collateral attack because the bar on untimely petitions for review is nonjurisdictional. Texas Br. 24-25. They cite *Henderson v. Shinseki*, 131 S. Ct. 1197 (2011), but that case involved review by an *Article I* court, *id.* at 1204, and distinguished (but did not overturn) *Stone v. INS*, 514 U.S. 386 (1995), which held—as to an Article III court—that "statutory provisions specifying the timing of review" are, "as we have often stated, mandatory and jurisdictional," *id.* at 405 (citation and internal quotation marks omitted). Also inapt is *Kontrick v. Ryan*, 540 U.S. 443 (2004), which addressed requirements imposed not by statute, but by court rule, *id.* at 453-54. Here, the filing requirements are statutory, 42 U.S.C. 7607(b)(1), and under respondents' own test are jurisdictional, as they "delineate the 'classes of cases' a court may hear." I/L Br. 43 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160 (2010)). See also 42 U.S.C. 7607(e) (Act's review regime is exclusive).

C. EPA Properly Used Its FIP Authority to Implement the Good Neighbor Obligations

EPA's FIPs for the 1997 and 2006 NAAQS were properly grounded in the agency's authority under Sections 7410(a)(2)(D), 7410(c) and 7602(y). EPA's

actions, taken more than ten years after the 1997 NAAQS were established and five years after promulgation of the 2006 NAAQS, were essential protections mandated by Section 7410(c) and critical to protect human health.

Texas claims that EPA may not invoke Section 7410(k)(6) to correct its prior approvals of 22 CAIR SIPs addressing the 1997 NAAQS because any legal flaw that *North Carolina* identified did not exist at the time the SIP was approved. Texas Br. 29. EPA's action merely corrected any statement that the previously approved SIPs satisfied Good Neighbor obligations or extinguished EPA's related FIP obligations with respect to the 1997 NAAQS. EPA was bound to do so by the court's actions because "the decision of a federal court must be given retroactive effect." *Nat'l Fuel Gas Supply Corp. v. FERC*, 59 F.3d 1281, 1289 (D.C. Cir. 1995) (citing *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993)). EPA did not "change its interpretation" of the Good Neighbor provision, Texas Br. 29; it merely invoked Section 7410(k)(6) to give effect to the court's decision in *North Carolina*.

EPA's authority to promulgate a federal plan did not "expire," Texas Br. 29, once the agency approved the CAIR SIPs. The agency retains its statutory duty to ensure plans are in place to address Good Neighbor obligations until those obligations are satisfied. 42 U.S.C. 7410(c). Moreover, EPA properly invoked the good cause exemption from notice and comment requirements, which applies to Clean Air Act regulatory actions either under 5 U.S.C. 553(b)(3)(B) directly, or via Section

7607(d)(1)'s language expressly incorporating Section 553(b)(3)(B).

Respondents suggest that EPA's use of Transport Rule modeling in its evaluation of Kansas's and Delaware's SIPs to address the 2006 NAAQS demonstrates that EPA's assessment of SIPs was dependent on the content of its FIP actions. UARG Br. 24-26. Both reviews took place in 2011, two years after the deadline for submitting transport SIPs for the 2006 NAAQS passed. See 76 Fed. Reg. 43,143 (July 20, 2011) (Kansas); 76 Fed. Reg. 53,638 (Aug. 29, 2011) (Delaware). EPA's use of all information available to it when evaluating SIP submittals is nothing other than good administrative practice. Use of Transport Rule modeling did not indicate that the agency expected States to have predicted the analysis that EPA would later adopt, but rather that, if States disagreed with EPA's available data, they must provide technical data indicating that EPA's analysis was flawed. This is precisely what took place. Delaware provided extensive technical information regarding State emissions inventories and regulations to rebut EPA's proposed conclusion that Delaware was significantly contributing to nonattainment. 76 Fed. Reg. 2853, 2857 (Jan. 18, 2011). Based in part on that information, EPA agreed that Delaware had met its Good Neighbor obligations. 76 Fed. Reg. at 53,638. Similarly, Kansas provided additional data which was subsequently used to adjust its emissions budgets. 77 Fed. Reg. 34,830, 34,840 (June 12, 2012).

Respondents argue that States were not required to submit Good Neighbor SIPs, because Section

7410(a)(2)(D)(i)(I) contains ambiguous language (in particular, the phrase "contribute significantly"), and thus contains a "gap" that only EPA can fill. Texas Br. 39-40, 52. Statutory ambiguity does not warrant ignoring what is unambiguous, including the statute's carefully crafted sequence of implementation steps, each with a deadline to promote accountability. ALA Br. 51-52; see also *General Motors*, 496 U.S. at 533 (integrated SIP timetable in 1970 Act "reflected the urgency of establishing air-pollution controls").

Respondents' arguments contravene the Act's language—and its cooperative federalism paradigm. They deny States the statutorily prescribed opportunity to implement NAAQS by crafting Good Neighbor SIPs and deny EPA's statutorily prescribed obligation—expressly recognized by this Court's precedent—to step in with FIPs when States fail to submit state plans that conform to Section 7410(a)(2). See *Train v. NRDC*, 421 U.S. at 79.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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In the Supreme Court of the United States

Nos. 12-1182 and 12-1183

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

A. The State Respondents' Challenges To The Relevant Federal Implementation Plans Lack Merit

1. The court of appeals concluded that the Environmental Protection Agency (EPA) lacked authority under the Clean Air Act (CAA or Act), 42 U.S.C. 7401 *et seq.*, to issue federal implementation plans (FIPs) within the Transport Rule because "a State cannot be 'required' to implement its good neighbor obligation in a [state implementation plan (SIP)] 'submission'—nor be deemed to have submitted a deficient SIP for failure to implement the good neighbor obligation—until

it knows the target set by EPA." Pet. App. 62a n.34. The court found that the "EPA's many SIP disapprovals and findings of failure to submit" were defective, and therefore could not serve as valid predicates for federal plans, because the agency had "made all of those findings *before* it told the States what emissions reductions their SIPs were supposed to achieve under the good neighbor provision." *Id.* at 49a.

As our opening brief explains (at 20-24), the court of appeals lacked jurisdiction to invalidate the Transport Rule on that ground because the court did not have before it any timely challenge to the EPA's prior state-plan disapprovals and findings of failure to submit.[1] The court therefore was required to accept the state-plan determinations as valid when considering the EPA's authority to issue federal implementation plans. Cf. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398-399 (1981) (discussing "res judicata consequences of a final, unappealed judgment").

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[1] The Act authorizes the D.C. Circuit to conduct "judicial review" of EPA action when a petition for review meeting specified requirements is filed. 42 U.S.C. 7607(b)(1). The Act states that none of its provisions "shall be construed to authorize judicial review of regulations or orders of the Administrator * * * *except as provided in* [*Section 7607*]." 42 U.S.C. 7607(e) (emphasis added). Accordingly, the statutory conditions on the court's exercise of jurisdiction are themselves jurisdictional. H.R. Rep. No. 294, 95th Cong., 1st Sess. 322 (1977) (House Report) (describing Section 7607(b)(1) as limiting the "jurisdiction" of the court of appeals). But even if the statutory prerequisites to judicial review were non-jurisdictional, the court below could not appropriately have declined to enforce them. Non-jurisdictional "claim-processing rules" rules are binding if timely invoked, *e.g.*, *Eberhart* v. *United States*, 546 U.S. 12, 19 (2005) (per curiam), and the government preserved its current argument below, Gov't C.A. Br. 46-47.

2. The Upwind States[2] make no effort to defend the court of appeals' reasoning. Instead, they now assert that they "are not attacking *any* of [the EPA's] past SIP disapprovals or findings of failure to submit," Upwind States Br. 19, but rather "are contesting only the *type* of FIPs that EPA could issue" in the Transport Rule, *id.* at 20; see *id.* at 61. They argue in particular that the EPA was required to inform each covered State of its emissions budget, and then give that State a reasonable time to act, before announcing a federal implementation plan that allocates the State's emissions budget among individual sources within the State. *Id.* at 20, 39. That argument is flawed in multiple respects.

a. i. The Upwind States' challenge to the content of the federal implementation plans cannot be reconciled with their (correct) concession that the legality of the EPA's prior findings and disapprovals must be taken as given. Those findings and disapprovals depended upon the premise that the States had *already* breached existing legal obligations to submit state implementation plans with adequate good-neighbor provisions. That premise depended in turn on the EPA's view that its promulgation of National Ambient Air Quality Standards (NAAQS) for ozone and $PM_{2.5}$ had triggered the States' good-neighbor obligations, even though the EPA had not yet announced specific emissions budgets for individual States.

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[2] Many States are both downwind and upwind. To avoid confusion, this brief will refer to the States that are respondents seeking affirmance of the court of appeals' decision as the Upwind States and those that are respondents seeking reversal as the Downwind States.

The Upwind States contend (Br. 39) that the federal implementation plans were legally defective because the EPA issued them "without ever telling the States *how much* contribution to another State's air pollution would be deemed 'significant.'" But if the States' good-neighbor obligations did not arise until the EPA had quantified their required emissions reductions in that manner, there would have been no legal justification for the agency's prior findings and disapprovals. The Upwind States do not explain how their challenge to the substance of the federal implementation plans can be reconciled with their acceptance of the predicate findings and disapprovals.

ii. The CAA includes a series of deadlines to ensure achievement of air-quality goals "as expeditiously as practicable," 42 U.S.C. 7502(a)(2)(A). See Gov't Br. 18-19. It likewise imposes many regulatory obligations on the EPA. *Id.* at 27; see Downwind States Br. 26. No CAA provision, however, directs the EPA to quantify States' levels of significant contribution or makes the States' own obligations contingent upon the EPA's taking that step.

The Upwind States suggest that, because the EPA's interpretations of "contribute significantly" (42 U.S.C. 7410(a)(2)(d)(i)(II)) and other ambiguous CAA terms are entitled to judicial deference, the States are foreclosed from implementing provisions that contain those terms until the EPA has acted. Br. 40, 53-55 (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 843-844 (1984)). Such a prohibition would disrupt the balance that Congress struck in 42 U.S.C. 7410, under which the States have initial responsibility to adopt implementation plans that satisfy the statutory criteria, including the good-neighbor requirements con-

tained in Section 7410(a)(2)(D). In the absence of an authoritative EPA interpretation, "the States' first-implementer role under Section [7410]" (Pet. App. 55a) necessarily entails the duty to construe ambiguous terms within that provision.[3]

iii. The Upwind States correctly observe (Br. 43) that "there must be *some* limitations on the FIP authority conferred by [S]ection 7410(c)(1)." See Br. 43-48. The CAA authorizes the EPA to promulgate a federal plan to correct an identified "deficiency" in a state plan with respect to a particular NAAQS. 42 U.S.C. 7410(c)(1). In this case, the Act unambiguously required States to adopt plans to eliminate emissions that significantly contribute to NAAQS nonattainment or maintenance problems in other States. 42 U.S.C. 7410(a)(2)(D)(i)(I). When the EPA determined that particular States had failed to meet that requirement, it promulgated federal plans to fill that gap.

As the Upwind States emphasize (Br. 49-50), the state emissions budgets announced in the Transport Rule reflect a complex mix of factual and policy assessments. Thus, even a State that rigorously analyzed its own good-neighbor obligations would have been unlikely to calculate an emissions budget that

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[3] Indeed, many of the Upwind States previously argued that the EPA lacks authority to interpret the good-neighbor provision because that provision imposes obligations on the States rather than on the EPA. Petitioning States Br. at 34-40, *Michigan* v. *EPA*, 213 F.3d 663 (2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001). The D.C. Circuit rejected that argument, concluding that the agency had "reasonably" determined that it had general rulemaking authority to construe the provision. 213 F.3d at 687. The court in *Michigan* did not suggest, however, that States are precluded from construing ambiguous CAA terms in the course of performing their statutory responsibilities.

precisely matched the figure the EPA ultimately chose. For each of the Upwind States, however, the "deficiency" that prompted the EPA to issue its disapproval or finding of failure to submit, and subsequently to announce a federal implementation plan, was not the State's failure to satisfy the precise contours of a not-yet-announced EPA rule. Rather, it was the State's failure to adopt a state plan provision that would "prohibit[]" the emission of "pollutant[s] in amounts which will * * * contribute significantly" to nonattainment in downwind States. 42 U.S.C. 7410(a)(2)(D)(i)(I). Any Upwind State that believed its own good-neighbor provision satisfied that requirement could have sought judicial review of the EPA's disapproval or finding of failure to submit.

The Upwind States also observe (Br. 51 n.13) that, if a particular State wishes to avoid imposing emissions limits more stringent "than those EPA deems necessary," it can reliably achieve that objective only by waiting to see what "overall reductions EPA will require." See Pet. App. 91a (Rogers, J., dissenting). Congress placed the initial responsibility for implementing the NAAQS upon the States, however, and that choice necessarily entails the possibility that a conscientious State may adopt measures more protective than those the EPA would have imposed. In any event, by simply declining to adopt adequate good-neighbor provisions, the Upwind States effectively (though unlawfully) eliminated the risk that they might inadvertently self-impose restrictions more stringent than those the Transport Rule ultimately contained. Those States cannot now avoid the relatively minor incursion on their autonomy (the EPA's adoption of federal implementation plans, subject to

possible replacement by compliant state plans, pp. 7-8, *infra*) that the CAA specifies as the consequence of that choice.

iv. There is likewise no merit to the Upwind States' contentions (*e.g.*, Br. 53) that the EPA departed without justification from the approach it had taken in prior rulemakings. In the NO_x SIP Call, the EPA required States to revise their state plans under 42 U.S.C. 7410(k)(5), which permits such a "SIP Call" when state plans that had previously been approved and that met statutory requirements have become inadequate. *Michigan* v. *EPA*, 213 F.3d 663, 669, 685 (D.C. Cir. 2000) (per curiam), cert. denied, 532 U.S. 903, and 532 U.S. 904 (2001); 76 Fed. Reg. 43,133 (July 20, 2011). In the Clean Air Interstate Rule (CAIR), by contrast, the EPA issued federal implementation plans, 71 Fed. Reg. 25,338-25,340 (Apr. 28, 2006), just as it did here. It is true that in CAIR, the lengthy compliance times made it possible for States to submit state plans to replace their federal plans before the new requirements took effect. *Ibid.* But the D.C. Circuit subsequently held that the EPA's CAIR deadlines were too lax, *i.e.*, they did not ensure sufficiently prompt action by Upwind States to reduce their significant contribution to downwind nonattainment of air quality standards. *North Carolina* v. *EPA*, 531 F.3d 896, 911-912 (2008) (per curiam), modified on reh'g, 550 F.3d 1176.

The deadlines in the Transport Rule were a direct response to that holding. Pet. App. 175a-176a, 449a-456a; see *id.* at 93a (Rogers, J., dissenting). And while the Transport Rule adopted federal plans for the Upwind States, it authorized those States to replace the federal plans with their own state plans as early as

2014 (and to allocate allowances as they saw fit as early as 2013). *Id.* at 669a-689a. Notwithstanding *North Carolina*, the Upwind States now contend that the EPA was required to delay its action in order to give them more time to submit state plans, even though they had already failed to meet statutory deadlines for doing so (or had submitted inadequate plans). The Act cannot sensibly be read to whipsaw the agency in this way.

In any event, the question here is not whether the EPA *could have* pursued an alternative approach, but whether the Act unambiguously *prohibited* the agency from pursuing the course it chose. *Chevron*, 467 U.S. at 842-845. The CAA directs the EPA to "promulgate a Federal implementation plan at any time within 2 years after" it disapproves a proposed state plan or makes a finding of failure to submit. 42 U.S.C. 7410(c)(1). The statute thus imposes an outer limit of two years from the date of the finding or disapproval, while giving the EPA broad discretion to choose an appropriate date within that interval. Although the EPA may sometimes deem it appropriate to wait the full two years in order to give States every opportunity to devise their own compliant plans, the agency reasonably determined that time was of the essence here.

v. As explained above, the Upwind States (Br. 20) disavow any contention that the EPA lacked authority to issue federal implementation plans at all; they "contest[] only the *type* of FIPs that EPA could issue" before individual States' good-neighbor obligations had been quantified. The only concrete alternative they suggest, however, is that the EPA should have issued federal implementation plans based on CAIR

while giving the Upwind States yet another opportunity to submit legally adequate state plans. *Id.* at 61-62. Such an approach would have violated the mandate in *North Carolina*, which found CAIR to be legally defective and insufficiently protective of Downwind States. Although the D.C. Circuit ultimately decided not to vacate CAIR, despite its "fundamental flaws," the court made clear that the EPA was required to replace it quickly. *North Carolina*, 550 F.3d at 1178.[4]

b. The Upwind States contend (Br. 25-39) that the EPA lacked authority to issue federal plans for States whose plans under CAIR had previously been approved. The court of appeals did not address that argument, Pet. App. 48a n.29, and this Court need not decide the question in the first instance, *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012). In any event, the argument lacks merit.

i. The EPA had authority to issue federal plans for the relevant States based on pre-CAIR findings of failure to submit state plans. Gov't Br. 32-33. The EPA did not "retroactively revoke" its subsequent, post-CAIR approvals of those States' plan submissions. Upwind States Br. 27; see *id.* at 28-34. Those submissions remained in place for the purpose

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[4] The EPA could not have satisfied its obligation to issue federal implementation plans within two years after the various findings and disapprovals simply by advising the Upwind States of their respective emission budgets. The CAA defines the term "Federal implementation plan" to mean a plan that "includes enforceable emission limitations or other control measures, means or techniques." 42 U.S.C. 7602(y). An EPA advisory document that simply quantified a State's emission budget, without imposing enforceable limits on particular emission sources within the State, would not be a "Federal implementation plan" under that provision.

of implementing CAIR. Instead, recognizing the binding force of the D.C. Circuit's adverse decision in *North Carolina*, the EPA merely corrected statements in the prior approval decisions that the plans satisfied those States' good-neighbor obligations. 42 U.S.C. 7410(k)(6) (authorizing the EPA to "revise" a previous state-plan determination "as appropriate" when the agency concludes it "was in error"); 42 U.S.C. 7410(c)(1) (the EPA's federal-plan authority ends if the agency approves a state plan *and* "the State corrects the deficiency").

The Upwind States contend (Br. 29) that the EPA's Section 7410(k)(6) correction authority may be used only when the prior action "was erroneous based on the law in existence *at that time*." But "[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312-313 (1994). Accordingly, the D.C. Circuit's decision in *North Carolina* meant that the CAIR state-plan approvals were erroneous when issued, and that the state plans were likewise deficient when submitted. The EPA's recognition of those facts was not an exercise of retroactive lawmaking. *Id.* at 311-313; cf. Upwind States Br. 30, 32.[5]

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[5] The Upwind States contend (Br. 32-33) that the EPA was required to use notice-and-comment rulemaking when issuing corrections under 42 U.S.C. 7410(k)(6). That is incorrect. The EPA invoked the good-cause exception of the Administrative Procedure Act (APA) to the notice-and-comment requirement. Pet. App. 183a-184a (citing 5 U.S.C. 553(b)(B)). The CAA's separate rulemaking requirements do not cover EPA actions on SIP submissions, and, in any event, do not apply when the APA's good-cause standard is satisfied. 42 U.S.C. 7607(d)(1); Pet. App. 184a.

ii. Even if the EPA lacked authority to issue federal plans regarding the 1997 air quality standards for those States with previously approved CAIR state plans, the agency's authority to issue the Transport Rule would have been largely unchanged. Gov't Br. 33 n.11. That is so because, except for Texas and South Carolina, the rule's state-by-state emission budgets for annual NO_x and SO_2, Pet. App. 958a-962a, 1211a-1214a, 1335a-1338a, independently implement the Upwind States' good-neighbor obligations with respect to the 2006 $PM_{2.5}$ air-quality standard, which CAIR did not address, and because there is substantial overlap between the sets of States subject to the rule's annual NO_x and ozone-season NO_x emission budgets, *id.* at 143a-144a.

Contrary to the Upwind States' contention (Br. 37-39), a finding that the EPA lacked authority to issue federal plans with respect to a subset of States, such as South Carolina and Texas, would provide no basis for invalidating the entire Transport Rule. The federal plan for each State is separate, *e.g.*, Pet. App. 886a-889a (South Carolina), 894a-899a (Texas); the EPA's regulations include a severability provision, 40 C.F.R. 52.17; and the D.C. Circuit has previously held that particular States were erroneously included in regional transport rules without suggesting that its decision would invalidate the rules in toto, *e.g.*, *Michigan*, 213 F.3d at 681 (excising Wisconsin from the NO_x SIP Call).

B. In Rejecting The EPA's Significant-Contribution Analysis, The Court Of Appeals Improperly Entertained Objections Not Presented To The Agency And Misconstrued The Relevant Statutory Language

1. The court of appeals should not have vacated the Transport Rule based on statutory objections to the EPA's significant-contribution analysis that were not "raised with reasonable specificity" before the agency. 42 U.S.C. 7607(d)(7)(B); see Gov't Br. 34-42.

a. Industry-Labor respondents recognize (Br. 46-47) that the regulatory history is relevant to the exhaustion analysis, but they draw the wrong lesson from it. In its 2000 decision reviewing the NO_x SIP Call, the D.C. Circuit upheld the EPA's decision to define significant contribution by reference to the amount of emission reductions achievable through "highly cost-effective controls." *Michigan*, 213 F.3d at 677-680. Industry parties sought review of that decision in this Court, arguing that the EPA may not consider costs when calculating an Upwind State's degree of significant contribution. Pet. at 14-19, *Appalachian Power Co.* v. *EPA*, 532 U.S. 903 (No. 00-445). This Court denied the petition. 532 U.S. 903 (2001). In 2005, the EPA used the same approach in CAIR, and the D.C. Circuit declined to disturb it. *North Carolina*, 531 F.3d at 916-917.

In the Transport Rule proceeding, the EPA's notice of proposed rulemaking (NPRM) recounted that history and stated that the agency intended "to consider the cost of controls to determine what portion of a state's contribution is its 'significant contribution.'" 75 Fed. Reg. 45,298 (Aug. 2, 2010) (citing *Michigan* and *North Carolina*). The agency explained that it had examined alternatives, including air-quality-only

approaches excluding cost considerations, but was not inclined to adopt them. *Id.* at 45,299; C.A. App. 2308-2312 (noting that one such approach would require draconian emission reductions in some States, *e.g.*, 93% in Indiana, and that another would be mathematically impossible to apply where, as is typical, an Upwind State contributes to nonattainment in more than one downwind area).

Against this backdrop, a party wishing to advance the objections respondents now assert had an obvious course to pursue. It was required to file comments in response to the NPRM stating that (1) the CAA prohibited the EPA's cost-based approach, and (2) the EPA was therefore legally compelled to adopt an air-quality-only approach. Respondents did not do so. Industry-Labor respondents discuss (Br. 47-51) several comments that they claim adequately preserved their statutory objections. But none of those comments argued with "reasonable specificity" (42 U.S.C. 7607(d)(7)(B)), or even reasonable generality, that the EPA's approach was invalid on its face because it reflected a legally impermissible interpretation of the statutory term "contribute significantly." Gov't Br. 38-42; American Lung Ass'n Br. 31-35.

Industry-Labor respondents' failure in this regard is starkly illuminated by their repeated invocation of *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), in an attempt to bar consideration of many of the EPA's statutory counter-arguments on the ground that the EPA did not state them in the administrative proceedings. Industry-Labor Br. 16, 17, 18, 20, 21, 40. The absence of administrative response to those arguments is explained entirely by the fact that no one made the arguments during the rulemaking.

b. Industry-Labor respondents contend (Br. 42-45) that Section 7607(d)(7)(B) is not jurisdictional. Every court that has considered the question has correctly reached the contrary conclusion. *E.g.*, *North Dakota* v. *EPA*, 730 F.3d 750, 770 (8th Cir. 2013); *National Ass'n of Clean Water Agencies* v. *EPA*, No. 11-1131, 2013 WL 4417438, at *41 (D.C. Cir. Aug. 20, 2013); *Oklahoma* v. *EPA*, 723 F.3d 1201, 1222 (10th Cir. 2013). By its terms, the provision is a limitation on the category of objections that "may be raised during judicial review." 42 U.S.C. 7607(d)(7)(B); see House Report 323 (provision limits authority of a "reviewing court" to consider unpreserved objections).

In any event, even non-jurisdictional claim-processing rules are binding if timely invoked, note 1, *supra*, and the government argued below that respondents' statutory arguments had not been adequately preserved, Gov't C.A. Br. 26, 30, 32 & n.18.[6] And while the government's petition for a writ of certiorari characterized the preservation issue as jurisdictional (consistent with the uniform understanding of the lower courts), the question whether Section 7607(d)(7)(B) imposes a non-jurisdictional barrier to review is fairly included in the question presented. Sup. Ct. Rule 14.1(a).

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[6] To the extent the EPA did not phrase its waiver claims more categorically in its court of appeals brief, Industry-Labor Br. 46, that is because agency counsel (operating on a highly expedited briefing schedule) were appropriately cautious in allowing for the possibility that they might have overlooked a particular comment among the tens of thousands filed in the proceeding. Industry-Labor respondents were in the best position to identify comments through which their claims on appeal had been preserved. They failed to do so.

c. Industry-Labor respondents contend (Br. 52-55) that this Court should affirm the judgment below even if their arguments were not properly preserved. Such a course is inconsistent with the text of Section 7607(d)(7)(B). Indeed, even when a particular objection could not feasibly have been raised during the period for public comment, Section 7607(d)(7)(B) does not authorize the objecting party to raise it during judicial review of the pertinent rule itself, but instead establishes a mechanism for EPA reconsideration in light of the new objection. That aspect of the CAA's judicial-review regime highlights Congress's commitment to the principle that "the first decider under the [Clean Air] Act is the expert administrative agency, the second federal judges." *American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2539 (2011) (*AEP*). That principle is especially critical in an area of extraordinary scientific, technical, and economic complexity, Gov't Br. 18-19, and particularly where (as here) a litigant's legal objections are closely linked to predictions about the likely practical consequences of the challenged EPA action.

2. The EPA's approach to the good-neighbor provision reflects a reasonable interpretation of the term "contribute significantly." Gov't Br. 42-55.

a. Industry-Labor respondents contend (Br. 22-36) that the EPA is statutorily prohibited from considering costs *at all* when calculating the level of a State's significant contribution to downwind nonattainment. Instead, they contend that the agency must use a strictly proportional approach based only on air-

quality factors. Those respondents are mistaken. Gov't Br. 42-50.[7]

i. As noted above (p. 12, *supra*), the D.C. Circuit in *Michigan* correctly rejected this argument, explaining that the term "significantly" (as used in the good-neighbor provision) is ambiguous, and that the EPA may permissibly determine the amount of a State's "significant" contribution by reference to the amount of emissions reductions achievable through application of "highly cost-effective controls." 213 F.3d at 677-680; see Gov't Br. 42-45. The fact that the EPA first adopted its interpretation in 1998 and has applied it multiple times makes it particularly worthy of deference. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009); *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 487 (2004).[8]

ii. If a particular State did not contribute more than one percent of a NAAQS to *any* downwind receptor in an area with nonattainment or maintenance problems, that State was not included in the Trans-

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[7] Another group of industry respondents contends that the EPA may use cost considerations, but only to *lessen* Upwind States' good-neighbor obligations. Util. Air Regulatory Grp. Br. 28 & n.6.

[8] Even before the term "contribute significantly" was added to the CAA in 1990 (Gov't Br. 5), the EPA had construed the prior version of the statute to require a downwind State "to show a significant contribution by an out-of-State source to [the Downwind State's] violation" of a NAAQS in order to obtain redress under the good-neighbor provision. 49 Fed. Reg. 34,859 (Sept. 4, 1984). The EPA explained that, in determining whether a particular contribution was "significant," the agency would consider, *inter alia*, "the relative stringencies of the pollution controls placed on in-State sources compared to those placed upon out-of-State sources" and "the relative costs of pollution abatement between sources that contribute to a violation." *Ibid.*

port Rule for that NAAQS. Pet. App. 137a-138a, 255a. The EPA explained that "[S]tates whose contributions are below these thresholds do not significantly contribute to nonattainment or interfere with maintenance of the relevant NAAQS." *Id.* at 255a. Industry-Labor respondents argue that, by then considering costs in quantifying the significant contributions of the States that *were* included in the Transport Rule, the EPA "adopted inconsistent definitions *of the very same statutory language*." Br. 38; see *id.* at 36-40. That argument reflects a misunderstanding of the EPA's two-step approach.

In quantifying the various Upwind States' significant contributions to downwind nonattainment or maintenance problems, the EPA was determining the extent to which particular Upwind States should be held *legally responsible* for other States' (actual or potential) violations of the NAAQS. Pet. App. 317a-318a ("[I]nterpreting significant contribution to nonattainment and interference with maintenance inherently involves a decision on how much emissions control responsibility should be assigned to upwind states, and how much responsibility should be left to downwind states."). At least in theory, "there may be cases when upwind states contributing to a specific downwind nonattainment area have already done a great deal to reduce emissions while the downwind state in which the nonattainment area is located has done very little." 75 Fed. Reg. at 45,271 (NPRM). The EPA could appropriately consider the relative prior emission-control efforts of Upwind and Downwind States in determining whether, and to what extent, an Upwind State should be treated as the legal cause of a downwind violation.

Nuisance law confirms the propriety of that approach. See *AEP*, 131 S. Ct. at 2537-2538 (CAA displaced analogous nuisance actions for pollution abatement). Nuisance law permits consideration of costs when weighing the gravity of harm against the utility of the conduct causing it. The Restatement of Torts illustrates this principle with a hypothetical involving reduction of air pollution: a factory that can reduce harmful emissions "[b]y installing certain available devices * * * at a cost of $10,000" must do so or be subject to nuisance liability, while a factory that produces the same level of emissions but can control them only through devices costing $150,000 may not have to install the devices. Restatement (Second) of Torts § 830 cmt. c, illus. 1 & 2, at 137-138 (1979); see *id.* § 828 cmt. h, at 133.

"Under EPA's two-step approach, only a state that (1) contributes a threshold amount or more to a particular downwind state receptor's air quality problem, and (2) has emission reductions available at the selected cost threshold can be deemed to have responsibility to reduce its emissions to improve air quality at that downwind receptor." Pet. App. 344a. Those two steps do not reflect inconsistent understandings of the statutory term "contribute significantly." Rather, they reflect the expert agency's judgment that an Upwind State should be legally responsible for a downwind CAA violation only if the Upwind State *both* has a specified factual connection to the relevant downwind receptor *and* has available to it reasonably cost-effective means of alleviating the problem. Neither the text of the good-neighbor provision nor the background nuisance principles on which it is based foreclosed the EPA from adopting that approach.

Industry-Labor respondents' reliance (*e.g.*, Br. 24-25) on *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), is misplaced. The Court in *American Trucking* held that the language of 42 U.S.C. 7409(b)(1), which directs the EPA to establish NAAQS in accordance with public-health criteria, unambiguously precluded consideration of costs. 531 U.S. at 465. The Court did not suggest, however, that this barrier to consideration of costs extended to the whole of the CAA. To the contrary, the Court contrasted the process of *establishing* NAAQS with other CAA provisions, including Section 7410 (which describes state implementation plans, including the good-neighbor provision), that guide "*implementers* of the NAAQS." *Id.* at 470; see *id.* at 469 n.1 (citing *Michigan*). The Court explained that "[i]t would be impossible to perform [the] task" of implementation "intelligently without considering which abatement technologies are most efficient, and most economically feasible." *Id.* at 470.

iii. A strict proportionality approach that excluded consideration of cost-effectiveness would have serious adverse practical consequences. First, it would mean that "if faced with two [S]tates, one of which could eliminate all relevant emissions at a trivial cost, while the other could eliminate none at a cost less than $5000 a ton, EPA must mandate the same cutback for each." *Michigan*, 213 F.3d at 676. Thus, "any aggregate cutback [in interstate air pollution] would be achieved at considerably higher cost * * * with absolutely no offsetting environmental benefit to the public." *Ibid.*; see Inst. for Policy Integrity Amicus Br. 16-33.

Second, a strict proportionality approach would create barriers to interstate trading of emission allowances. Gov't Br. 12 (discussing allowance trading under cap-and-trade system); see generally Calpine Corp. Resp. Br. 16-20, 38-42, 55-57; Hobbs Amicus Br. 21-31. That would be incompatible with Congress's intent as demonstrated by its amendment of the Act in 1990 to promote market-based approaches. Clean Air Act Amendments of 1990, Pub. L. No. 101-549 §§ 101(b), 108(j), 104 Stat. 2404, 2468 (adding "economic incentives such as fees, marketable permits, and auctions of emissions rights" to state and federal implementation plan provisions); 42 U.S.C. 7410(a)(2)(A), 7602(y).

Finally, the court of appeals built its proportionality requirement on a grossly over-simplified hypothetical involving three Upwind States and one downwind receptor. In the real world of myriad upwind-downwind linkages, however, a proportionality requirement would be mathematically impossible to apply. C.A. App. 2312; Gov't Br. 47-48; Atmospheric Scientists Amicus Br. 26-27. In response, Industry-Labor respondents point (Br. 34) to the court of appeals' acknowledgement that "it may not be possible to accomplish the ratcheting back in an entirely proportional manner among the upwind States." Pet. App. 29a. Rather than recognizing that this concession rendered its proportionality red line unworkable, the court said the EPA should have an undefined category of "discretion" to deviate from proportionality. *Id.* at 28a-29a. Neither the court of appeals nor the Industry-Labor respondents explain how the agency could have "discretion" to depart from what they contend is an inexorable statutory command.

Industry-Labor respondents also invoke (Br. 32) the court of appeals' conclusion that the EPA's methodology did not account for downwind States' own contributions to air-quality problems. That objection is baseless. In assessing the relative cost-effectiveness of various potential cost thresholds, the EPA estimated the impact on air quality that would occur if *both* Upwind *and* Downwind States achieved the emission reductions available at those thresholds. *E.g.*, Pet. App. 343a ("EPA assumes reductions at each cost threshold from the linked upwind states as well as the downwind receptor state to assess the shared responsibility of these upwind states to address air quality at the identified receptors."); 75 Fed. Reg. at 45,272 ("[O]ur methodology implicitly assumes controls at the same cost per ton level in the downwind state as in the upwind contributing states."). And in reality, downwind States have already adopted (or are considering adopting) much more expensive controls. C.A. App. 1587 ($40,000/ton of NOx), 1788 ($10,000/ton of NOx), 1882 ($2000-$80,000/ton of NOx). Respondents observe that a summary document cited by the government excludes certain in-state emissions, Industry-Labor Br. 33 (citing Gov't Br. 48), but they do not dispute that the substantial majority of pollution affecting downwind areas originates in Upwind States.

b. Industry-Labor respondents contend that the EPA's methodology violates the CAA because it fails to prevent "over-control in the downwind States." Br. 15 (citation omitted); see *id.* at 15-22. That argument elides the fact that the Act separately requires NAAQS attainment at *all* individual downwind locations, not a regional average. 42 U.S.C. 7410(a)(2)(D)(i)(I). It also elides the fact that a given

power plant does not emit discrete, separately-controllable NO_x and SO_2 streams, each of which affects a distinct downwind location. Rather, the only way to reduce an upwind facility's adverse impact on a particular downwind area is to reduce the facility's overall NO_x and SO_2 emissions.

For those reasons, the emission reductions needed to bring the most polluted downwind areas into attainment may have the practical effect of bringing less polluted downwind areas well below the NAAQS. That does not mean that the upwind emissions are over-controlled; it means that lesser reductions would result in *under*-control with respect to the most polluted areas. The likelihood that other downwind areas will have better air quality than the law requires is an unavoidable collateral benefit of the Transport Rule, not a sign of EPA overreaching.

Industry-Labor respondents make the same error when they contend that "less costly emission controls would have enabled downwind States to achieve attainment at *almost all* the same locations as the more costly controls EPA chose." Br. 16 (emphasis added). As an initial matter, this argument relates only to the EPA's selection of a $500/ton SO_2 threshold for a group of seven States. Gov't Br. 11; Pet. App. 356a-357a. It ignores completely the higher $2300 SO_2 threshold that applies to 16 States. *Ibid.* The EPA explained in detail why it chose that $2300/ton threshold, as opposed to some lower figure. Pet. App. 362a-365a.

Even with respect to the $500/ton SO_2 threshold, Industry-Labor respondents' own description of their proffered alternatives shows that adoption of those alternatives would have resulted in under-control.

For example, Industry-Labor respondents cite (Br. 16) a chart showing the number of downwind monitors that would have attainment or maintenance problems at cost controls decreasing in $100 increments from $500 to $100. C.A. App. 1374. The chart shows steady increases in the number of monitors with such problems at every $100 step-down from $500. *Ibid.*[9] The EPA explained that it based its choice of the $500/ton SO_2 threshold on "more detailed analysis using smaller increments" in the NPRM, Pet. App. 330a, and that analysis showed inferior results at cost thresholds below $500, 75 Fed. Reg. at 45,275-45,282.

Finally, to the extent a challenger could demonstrate that the EPA did not adequately explain its choice of cost thresholds, that showing would at most have supported a limited remand to the agency for further explanation. It would not support facial invalidation of the rule on statutory grounds. And the argument that lower cost thresholds should have been considered is unrelated to Industry-Labor respondents' overarching contention that, in defining each covered State's significant contribution to downwind pollution, the EPA should not have considered costs at all.

* * * * *

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[9] Industry-Labor respondents' contention (Br. 18) that the Transport Rule would result in substantial over-control with respect to the annual $PM_{2.5}$ NAAQS ignores the fact that substantially the same emission reductions were necessary to address the 24-hour $PM_{2.5}$ NAAQS, which is harder to achieve. The comparable data for that NAAQS do not demonstrate over-control. C.A. App. 2963, 2965.

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,

Petitioners,

and

AMERICAN LUNG ASSOCIATION, *ET AL.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* AMERICAN THORACIC SOCIETY IN SUPPORT OF PETITIONERS

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Yun-Chul Hong et al., *Effects of Air Pollutants on Acute Stroke Mortality*, 110 ENVTL. HEALTH PERSPS. 187 (2002) 6

INTEREST OF THE *AMICUS CURIAE*[1]

The American Thoracic Society (ATS) is an international educational and scientific organization founded in 1905 that represents more than 15,000 health care professionals. ATS works to prevent and fight respiratory disease around the globe through research, education, patient care, and advocacy. ATS publishes three peer-reviewed scientific journals that disseminate groundbreaking research, including studies on air pollution and health.

Amicus curiae ATS supports Petitioners' position because cross-border air pollution harms public health in downwind states. In light of this case's vital importance to the millions of citizens living in downwind states, *amicus* urges that this Court reverse the decision of the U.S. Court of Appeals for the D.C. Circuit and reinstate the U.S. Environmental Protection Agency's Cross State Air Pollution Rule, referred to below as the Transport Rule.

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[1] Pursuant to this Court's Rule 37.2(a), all parties were timely notified of *amicus'* intention to file this brief. Counsel for petitioners and respondents have consented to the filing of this brief and their written consent has been lodged with the Court. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Amicus curiae submits this brief to assist the Court in understanding the importance of the public health impacts of the air pollution at issue in this case. Air pollution measurably and substantially shortens lives. Vacating EPA's Transport Rule prevents the U.S. Environmental Protection Agency (EPA) from enforcing protections against such pollution. Should the decision of the U.S. Court of Appeals for the D.C. Circuit stand, it would condemn millions of American citizens to suffer preventable harm in violation of the Clean Air Act (CAA).

The Transport Rule addresses air pollution emitted by various sources, chiefly by electricity-generating facilities. Exposure to the pollutants emitted by these sources can have serious impacts on human health, including premature death, asthma exacerbations, and increased hospitalizations for cardiovascular and respiratory illnesses. These pollutants are especially harmful to children, whose respiratory systems are developing, to the elderly, whose respiratory systems are compromised by age, and to those whose respiratory systems are compromised by disease or disability.

The D.C. Circuit grounded its decision to vacate the Transport Rule upon a concern for "unnecessary over-control" of air pollution. In so doing, the D.C. Circuit cast aside EPA's carefully calibrated rule, which rationally took into account the benefits to human health available from reducing interstate air pollution. Numerous scientific studies demonstrate that improving air quality—in this

instance, by preventing upwind states from polluting the air downwind—benefits public health.

Amicus curiae ATS supports EPA's efforts to protect citizens of downwind states from the needless health risks caused by air pollution from upwind states. Ensuring that emissions from upwind states do not push air quality in downwind states out of compliance with national ambient air quality standards (NAAQS) is a crucial aspect of protecting Americans' air quality more generally. Accordingly, *amicus* ATS urges this Court to reverse the D.C. Circuit's decision.

ARGUMENT

I. AIR POLLUTION THAT CROSSES STATE LINES ENDANGERS THE LIVES AND HARMS THE HEALTH OF CITIZENS IN DOWNWIND STATES

This case presents issues of extraordinary importance because interstate air pollution threatens the lives and health of millions of Americans. Nitrogen oxide (NO_x) and sulfur dioxide (SO_2) emissions react in the atmosphere to form other dangerous pollutants, such as fine particulate matter (PM) and ground-level ozone. Plumes from electricity-generating facilities and other sources spread emissions great distances and affect PM and ozone levels in areas well beyond their place of origin, compromising public health in downwind regions. Exposure to these pollutants has long been

understood to have significant and severe health impacts, see STAFF OF S. COMM. ON THE ENV'T AND PUB. WORKS, 95TH CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1977, 6634-55 (1978).[2]

An extensive body of scientific and medical research documents the link between these emissions and human health.[3] PM emissions are especially dangerous because they can bypass the body's defensive mechanisms and become lodged deep in the smaller airways of the human lung; the smallest "ultrafine" particles can enter the blood

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[2] *See also* Ephraim Thaller et al., *Moderate Increases in Ambient $PM_{2.5}$ and Ozone are Associated with Lung Function Decreases in Beach Lifeguards*, 50 J. OCCUPATIONAL & ENVTL. MED. 202, 202 (2008) (reporting adverse effects of air pollution even at low levels); Morton Lippmann, *Health Effects of Airborne Particulate Matter*, 357 NEW ENG. J. MED. 2395, 2396 (2007); Edward S. Schelegle et al., *6.6-Hour Inhalation of Ozone Concentrations from 60 to 87 Parts Per Billion in Healthy Humans*, 180 AM. J. RESPIRATORY & CRITICAL CARE MED. 265, 265 (2009).

[3] *See generally* U.S. ENVTL. PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR PARTICULATE MATTER, EPA/600/R-08/139F (2009) [hereinafter INTEGRATED SCIENCE ASSESSMENT FOR PM] (reviewing and summarizing scientific literature on impacts of PM on human health); U.S. ENVTL. PROT. AGENCY, INTEGRATED SCIENCE ASSESSMENT FOR OZONE AND RELATED PHOTOCHEMICAL OXIDANTS, EPA 600/R-10/076F (2013) [hereinafter INTEGRATED SCIENCE ASSESSMENT FOR OZONE] (reviewing and summarizing scientific literature on impacts of ozone on human health).

stream and travel throughout the body.[4] These interactions increase the risk of premature death and cause or contribute to a host of respiratory and cardiopulmonary ailments, including asthma. Children, the elderly, and patients with cardiopulmonary disease are particularly susceptible to the adverse health effects of air pollution.

a. Air Pollution Shortens Lives

Exposure to air pollution kills.[5] In 2008, EPA elicited an assessment from twelve of the world's leading experts on the health effects of air pollution, which revealed substantial agreement on the likelihood of a causal connection between exposure and premature death.[6]

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[4] Günter Oberdörster et al., *Nanotoxicology: An Emerging Discipline Evolving from Studies of Ultrafine Particles*, 113 ENVTL. HEALTH PERSPS. 823, 823 (2005).

[5] U.S. ENVTL. PROT. AGENCY, EXPANDED EXPERT JUDGMENT ASSESSMENT OF THE CONCENTRATION-RESPONSE RELATIONSHIP BETWEEN $PM_{2.5}$ AND MORTALITY: FINAL REPORT, vii, 3-20 through 3-24 (2006); C. Arden Pope III et al., *Fine Particulate Air Pollution and Life Expectancies in the United States: the Role of Influential Observations*, 63 J. AIR WASTE MGMT. ASS'N 129, 131-32 (2013); Johanna Lepeule et al., *Chronic Exposure to Fine Particles and Mortality: An Extended Follow-Up of the Harvard Six Cities Study from 1974 to 2009*, 120 ENVTL. HEALTH PERSPS. 965, 968 (2012).

[6] INTEGRATED SCIENCE ASSESSMENT FOR PM at 1-14 through 1-24; *see also* Henry A. Roman et al., *Expert Judgment Assessment of the Mortality Impact of Changes in Ambient Fine Particulate Matter in the U.S.*, 42 ENVTL. SCI. TECH. 2268, 2270 (2008).

When air pollution levels are high, deaths can occur immediately, or within months, by inducing heart attacks or strokes.[7] Daily PM exposure, even at low levels, can lead to premature mortality through multiple pathways.[8] Acute PM exposure increases the risk of death from respiratory and cardiovascular causes;[9] chronic exposure increases the risk of death from lung cancer and cardiovascular disease.[10]

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[7] Yun-Chul Hong et al., *Effects of Air Pollutants on Acute Stroke Mortality*, 110 ENVTL. HEALTH PERSPS. 187, 188 (2002); Shang-Shyue Tsai et al., *Evidence for an Association Between Air Pollution and Daily Stroke Admissions in Kaohsiung, Taiwan*, 34 STROKE 2612, 2615 (2003).

[8] C. Arden Pope III & Douglas W. Dockery, *Health Effects of Fine Particulate Air Pollution: Lines that Connect*, 56 J. AIR WASTE MGMT. ASS'N 709 (2006) (presenting new evidence and noting consistent evidence found by serial prior studies).

[9] Meredith Franklin et al., *Association Between $PM_{2.5}$ and All-Cause and Specific-Cause Mortality in 27 US Communities*, 17 J. EXPOSURE SCI. & ENVTL. EPIDEMIOLOGY 279, 279, 285 (2007); Cathryn Tonne et al., *A Case-Control Analysis of Exposure to Traffic and Acute Myocardial Infarction*, 115 ENVTL. HEALTH PERSPS. 53, 53 (2007).

[10] C. Arden Pope III et al., *Cardiovascular Mortality and Long-Term Exposure to Particulate Air Pollution: Epidemiological Evidence of General Pathophysiological Pathways of Disease*, 109 CIRCULATION 71, 74-76 (2004) (finding 10μg/m3 increase in $PM_{2.5}$ increased mortality risk by 8-18%); C. Arden Pope III et al., *Lung Cancer, Cardiopulmonary Mortality, and Long-Term Exposure to Fine Particulate Air Pollution*, 287 J. AM. MED. ASS'N 1132, 1136-37 (2002).

Numerous studies also demonstrate that short-term exposure to ozone can shorten life.[11]

Successive assessments of the risk of premature mortality from air pollution have shown that risk to be greater than previously believed.[12] In 2007, a groundbreaking study of 66,000 women in thirty-six U.S. cities found that an increase in ten micrograms per cubic meter[13] of $PM_{2.5}$ (particulate matter less than 2.5 micrometers in aerodynamic diameter) raised the risk of death from cardiovascular disease by seventy-six percent.[14]

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[11] *See, e.g.*, Michelle L. Bell et al., *A Meta-Analysis of Time-Series Studies of Ozone and Mortality with Comparison to the National Morbidity, Mortality, and Air Pollution Study*, 16 EPIDEMIOLOGY 436, 442 (2005); Jonathan I. Levy et al., *Ozone Exposure and Mortality: An Empiric Bayes Metaregression Analysis*, 16 EPIDEMIOLOGY 458, 466 (2005); Kazuhiko Ito et al., *Associations Between Ozone and Daily Mortality: Analysis and Meta-Analysis*, 16 EPIDEMIOLOGY 446, 455 (2005).

[12] C. Arden Pope III, *Mortality Effects of Longer Term Exposures to Fine Particulate Air Pollution: Review of Recent Epidemiological Evidence*, 19 INHALATION TOXICOLOGY 33 (Supp. 1, 2007) (concluding short-term exposure studies capture only small amount of overall health effects of long-term repeated PM exposure); Michael Jerrett et al., *Spatial Analysis of Air Pollution and Mortality in Los Angeles*, 16 EPIDEMIOLOGY 727, 732 (2005).

[13] Concentrations of chemicals in air are typically measured in units of the mass of chemical (milligrams, micrograms, nanograms, or picograms) per cubic meter or cubic foot of air.

[14] Kristen A. Miller et al., *Long-Term Exposure to Air Pollution and Incidence of Cardiovascular Events in Women*, 356 NEW ENG. J. MED. 447, 456-57 (2007).

These results reflect improved data collection and methodologies and update earlier, less thorough studies that had identified a twelve percent increase in risk for every increase of ten micrograms per cubic meter.[15] A 2009 review of epidemiological studies by the California Environmental Protection Agency's Air Resources Board found a strong relationship between $PM_{2.5}$ exposure and premature death generally, and concluded that the risk of mortality rose by ten percent for every ten micrograms per cubic meter.[16] In addition, several studies have undermined the suggestion that increases in mortality arising from air pollution exposure merely "displace" the demise of the sick or frail by just a few days.[17]

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[15] *See* Douglas W. Dockery & Peter H. Stone, *Cardiovascular Risks from Fine Particulate Air Pollution*, 356 NEW ENG. J. MED. 511, 511 (2007) (noting approvingly updated results and methodological improvements in Miller et al. (2007)).

[16] AIR RES. BD., CAL. ENVTL. PROT. AGENCY, METHODOLOGY FOR ESTIMATING PREMATURE DEATHS ASSOCIATED WITH LONG-TERM EXPOSURES TO FINE AIRBORNE PARTICULATE MATTER IN CALIFORNIA: DRAFT STAFF REPORT 1 (2009) (attributing 18,000 deaths annually to $PM_{2.5}$ in California alone).

[17] Antonella Zanobetti et al., *The Temporal Pattern of Respiratory and Heart Disease Mortality in Response to Air Pollution*, 111 ENVTL. HEALTH PERSPS. 1188, 1192 (2003); Francesca Dominici et al., *Airborne Particulate Matter and Mortality: Timescale Effects in Four US Cities*, 157 AM. J. EPIDEMIOLOGY 1055, 1062 (2003).

Ozone also shortens lives, as demonstrated by several multi-city studies,[18] including two that identified elevated risk of premature death in the northeastern U.S.[19]—the states most directly served by the Transport Rule. The National Research Council confirmed this threat from ozone in a 2008 report, in which the Council also explained that premature death caused by ozone is not restricted to people who are already in poor health.[20]

b. Air Pollution Impairs Cardiovascular and Respiratory Health

Exposure to air pollution can also cause serious illness and disease. Researchers have found a significant association between air pollution and risk

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[18] Michelle. L. Bell et al., *supra* note 10, at 442; Mercedes Medina-Ramón & Joel Schwartz, *Who Is More Vulnerable to Die from Ozone Air Pollution?*, 19 EPIDEMIOLOGY 672 (2008); K. KATSOUYANNI ET AL., HEALTH EFFECTS INST. RESEARCH REP. NO. 142, AIR POLLUTION AND HEALTH: A EUROPEAN AND NORTH AMERICAN APPROACH (APHENA) (2009).

[19] Michelle L. Bell & Francesca Dominici, *Effect Modification by Community Characteristics on the Short-Term Effects of Ozone Exposure and Mortality in 98 US Communities*, 167 AM. J. EPIDEMIOLOGY 986 (2008); Richard L. Smith et al., *Reassessing the Relationship Between Ozone and Short-Term Mortality in US Urban Communities*. 21 INHALATION TOXICOLOGY 37 (2009).

[20] NAT'L RES. COUNCIL, NAT'L ACAD. OF SCIS., ESTIMATING MORTALITY RISK REDUCTION AND ECONOMIC BENEFITS FROM CONTROLLING OZONE AIR POLLUTION 8 (2008).

of heart attacks.[21] Numerous studies link both ozone and PM air pollution to increased hospitalization for cardiovascular disease, strokes, and congestive heart failure.[22] Exposure to PM also increases the risk of blood clots[23] and affects blood vessel reactivity,[24] reducing the amount of blood that reaches the heart

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[21] Antonella Zanobetti & Joel Schwartz, *The Effect of Particulate Air Pollution on Emergency Admissions for Myocardial Infarction: A Multicity Case-Crossover Analysis*, 113 ENVTL. HEALTH PERSPS. 978, 980 (2005); Daniela D'Ippoliti et al., *Air Pollution and Myocardial Infarction in Rome: A Case-Crossover Analysis*, 14 EPIDEMIOLOGY 528, 528 (2003).

[22] *See, e.g.*, Francesca Dominici et al., *Fine Particulate Air Pollution and Hospital Admission for Cardiovascular and Respiratory Diseases*, 295 J. AM. MED. ASS'N 1127, 1133 (2006); Kristi B. Metzger et al., *Ambient Air Pollution and Cardiovascular Emergency Department Visits*, 15 EPIDEMIOLOGY 46, 55 (2004); William S. Linn et al., *Air Pollution and Daily Hospital Admissions in Metropolitan Los Angeles*, 108 ENVTL. HEALTH PERSPS. 427, 427 (2000); Tsai et al., *supra* note 6, at 26; Bruce Urch et al., *Relative Contributions of $PM_{2.5}$ Chemical Constituents to Acute Arterial Vasoconstriction in Humans*, 16 INHALATION TOXICOLOGY 345 (2004); Lynda D. Lisabeth, et al., *Ambient Air Pollution and Risk for Ischemic Stroke and Transient Ischemic Attack*, 64 ANNALS NEUROLOGY 53, 53-59 (2008).

[23] Andrea Baccarelli et al., *Exposure to Particulate Air Pollution and Risk of Deep Vein Thrombosis*, 168 ARCHIVES INTERNAL MED. 920, 926 (2008); Andrew J. Ghio et al., *Exposure to Concentrated Ambient Air Particles Alters Hematologic Indices in Humans*, 15 INHALATION TOXICOLOGY 1465, 1476 (2003).

[24] Urch et al., *supra* note 21, at 350-52.

and the brain.[25] Further, PM may inhibit the body's ability to vary its heart rate in response to environmental or situational changes.[26]

Long-term exposure to air pollution can inflict significant damage on the lungs[27] and reduce lung function.[28] Ambient concentrations of ozone and PM are associated with increased hospital admissions for pneumonia and chronic obstructive pulmonary disease.[29] Exposure to PM also increases emergency

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[25] Robert D. Brook et al., *Inhalation of Fine Particulate Air Pollution and Ozone Causes Acute Arterial Vasoconstriction in Healthy Adults*, 105 CIRCULATION 1534, 1535 (2002).

[26] Yuh-Chin T. Huang et al., *The Role of Soluble Components in Ambient Fine Particles-Induced Changes in Human Lungs and Blood*, 15 INHALATION TOXICOLOGY 327, 327 (2003).

[27] Ira B. Tager et al., *Chronic Exposure to Ambient Ozone and Lung Function in Young Adults*, 16 EPIDEMIOLOGY 751, 751 (2005); Andrew Churg et al., *Chronic Exposure to High Levels of Particulate Air Pollution and Small Airway Remodeling*, 111 ENVTL. HEALTH PERSPS. 714, 717-718 (2003); Patrick L. Kinney & Morton Lippmann, *Respiratory Effects of Seasonal Exposures to Ozone and Particles*, 55 ARCHIVES ENVTL. HEALTH 210, 215 (2000).

[28] John M. Peters et al., *A Study of Twelve Southern California Communities with Differing Levels and Types of Air Pollution: II. Effects on Pulmonary Function*, 159 AM. J. RESPIRATORY & CRITICAL CARE MED. 759, 765-66 (1999).

[29] Mercedes Medina-Ramón et al., *The Effect of Ozone and PM_{10} on Hospital Admissions for Pneumonia and Chronic Obstructive Pulmonary Disease: A National Multicity Study*, 163 AM. J. EPIDEMIOLOGY 579, 583-84 (2006); *see also* Dominici et al., *supra* note 21, at 1133.

room visits for patients suffering from acute and chronic respiratory ailments.[30]

Scientists observe that the relationship between ozone and respiratory illness is "so well established that emergency admissions have been suggested as a surrogate measure of ozone."[31] Even in healthy adults, short-term exposure can inflame the lungs and cause immediate discomfort.[32] A study of hikers in New Hampshire indicated that healthy individuals were more likely to experience significant declines in lung function on days with higher ambient ozone; the study observed adverse health effects even on days when ozone levels were well below the most recent regulatory standard for ozone.[33] PM can also induce inflammation of lung

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[30] STEPHEN VAN DEN EEDEN ET AL., PARTICULATE AIR POLLUTION AND MORBIDITY IN THE CALIFORNIA CENTRAL VALLEY: A HIGH PARTICULATE POLLUTION REGION 3-4 (2002).

[31] David V. Bates, *Ambient Ozone and Mortality*, 16 EPIDEMIOLOGY 427, 428 (2005).

[32] Ian S. Mudway & Frank J. Kelly, *An Investigation of Inhaled Ozone Dose and the Magnitude of Airway Inflammation in Healthy Adults*, 169 AM. J. RESPIRATORY & CRITICAL CARE MED. 1089, 1093 (2004); W.F. McDonnell et al., *Ozone-Induced Respiratory Symptoms: Exposure-Response Models and Association with Lung Function*, 14 EUROPEAN RESPIRATORY J. 845, 852 (1999).

[33] Susan Korrick et al., *Effects of Ozone and Other Pollutants on the Pulmonary Function of Adult Hikers*, 106 ENVTL. HEALTH PERSPS. 93, 97-99 (1998) (reporting adverse effects from exposure to average ozone levels ranging from 0.021-0.074ppb, well below 0.075ppm level mandated by 8-hour ozone NAAQS in 2008).

tissue in healthy adults.[34] Recent research has also found a strong and consistent correlation between adult diabetes and air pollution, suggesting that PM is a risk factor for diabetes.[35]

c. Air Pollution Exacerbates Asthma

Asthma is a chronic respiratory disease affecting 25.7 million Americans—8.4 percent of the nation.[36] Asthma inflames and narrows the airways of the lungs, making it difficult for an individual to breathe.[37] People with asthma have heightened sensitivity to airway irritants, such as PM and ozone, and airway irritation leads to recurring symptoms, such as wheezing, chest tightness, shortness of breath, and coughing.[38] An asthma attack can be both painful and frightening, as its onset is often sudden. Left untreated, asthma can lead to

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[34] Andrew J. Ghio et al., *Concentrated Ambient Air Particles Induce Mild Pulmonary Inflammation in Healthy Human Volunteers*, 162 AM. J. RESPIRATORY & CRITICAL CARE MED. 981, 986 (2000).

[35] John F. Pearson et al., *Association Between Fine Particulate Matter and Diabetes Prevalence in the U.S.*, 33 DIABETES CARE 2196 (2010).

[36] LARA J. AKINBAMI ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, NHCS DATA BRIEF NO. 94, TRENDS IN ASTHMA PREVALENCE, HEALTH CARE USE, AND MORTALITY IN THE UNITED STATES, 2001-2010, at 1 (2012).

[37] NAT'L HEART, LUNG, AND BLOOD INST., NAT'L INSTS. OF HEALTH, PUB. NO. 09-7429, AT A GLANCE: ASTHMA 1 (2009).

[38] *Id.*

permanent lung damage or fatalities.[39] Exposure to PM and ozone is especially harmful for people with asthma.[40] Indeed, health experts maintain that air pollution is "one of the most under-appreciated contributors to asthma exacerbation."[41] Recurrent asthma exacerbations can cause permanent airway damage, and, as well as being inconvenient, they are dangerous and often expensive.[42]

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[39] Diane E. McLean et al., *Asthma Among Homeless Children: Undercounting and Undertreating the Underserved*, 158 ARCHIVES PEDIATRICS & ADOLESCENT MED. 244, 247 (2004).

[40] Janneane F. Gent et al., *Association of Low-Level Ozone and Fine Particles with Respiratory Symptoms in Children with Asthma*, 290 J. AM. MED. ASS'N 1859, 1859 (2003); Helene Desqueyroux et al., *Short-Term Effects of Low-Level Air Pollution on Respiratory Health of Adults Suffering from Moderate to Severe Asthma*, 89 ENVTL. RES. 29, 29 (2002).

[41] George D. Thurston & David V. Bates, *Air Pollution as an Underappreciated Cause of Asthma Symptoms*, 290 J. AM. MED. ASS'N 1915, 1915 (2003); *see also* Ariel Spira-Cohen et al., *Personal Exposures to Traffic-Related Air Pollution and Acute Respiratory Health among Bronx Schoolchildren with Asthma*, 119 ENVTL. HEALTH PERSPS. 559, 559, 564 (2011) (collecting studies linking PM emissions to asthma exacerbation and identifying key causal factors in relationship).

[42] *See* Susan M. Pollart et al., *Management of Acute Asthma Exacerbations*, 84 AM. FAMILY PHYSICIAN 40, 40-47 (2011) (describing symptoms and treatment strategies).

d. Air Pollution Increases Health Risks for Vulnerable Subpopulations Such as Children

The adverse health effects of air pollution pose greater risks for certain populations, including children (18 years and younger), the elderly (65 years and older), people with chronic cardiovascular and lung disease, and people with diabetes.[43] Children are especially susceptible because their lungs are still developing,[44] and because they breathe more air per pound of body weight than adults, which increases the dose of inhaled pollutants.[45] Children also spend more time outdoors and have higher activity levels than adults, which means they generally inhale greater volumes of polluted air.[46]

Air pollution can affect health even before birth, as PM exposure during pregnancy is linked to

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[43] INTEGRATED SCIENCE ASSESSMENT FOR PM, *supra* note 2, at Ch. 8 ("Populations Susceptible to PM-Related Health Effects").

[44] Comm. on Envtl. Health, Am. Acad. of Pediatrics, *Ambient Air Pollution: Health Hazards to Children*, 114 PEDIATRICS 1699, 1699 (2004) (observing that eighty percent of alveolar function develops post-natally).

[45] *See* Kent E. Pinkerton et al., *Ozone, a Malady for All Ages*, 176 AM. J. RESPIRATORY & CRITICAL CARE MED. 107, 107 (2007) (collecting and summarizing studies that illustrate nature of and reasons for ozone's adverse impact on lungs of children).

[46] *Id.*; *see also* Comm. on Envtl. Health, Am. Acad. of Pediatrics, *supra* note 43 at 1699.

increased risk of premature birth[47] and PM and ozone are linked to increased risk of lower birth weight.[48] One study found that infants faced an increased risk of bronchiolitis for every increase of ten micrograms per cubic meter in $PM_{2.5}$ in the ambient air.[49] In Canada's largest cities, ozone is associated with increased hospitalization for respiratory problems in babies under one month old.[50]

The adverse effects of high ozone exposure can stay with children for life. A five-year study tracking 3,500 students in Southern California found that children who played team sports in areas with high daytime ozone concentrations had a greater risk of

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[47] Sharon K. Sagiv et al. *A Time Series Analysis of Air Pollution and Preterm Birth in Pennsylvania, 1997-2001*, 113 ENVTL. HEALTH PERSPS. 602, 605 (2005).

[48] Michelle L. Bell, *Prenatal Exposure to Fine Particulate Matter and Birth Weight: Variations by Particulate Constituents and Sources*, 21 EPIDEMIOLOGY 884 (2010); Muhammad T. Salam et al., *Birth Outcomes and Prenatal Exposure to Ozone, Carbon Monoxide, and Particulate Matter: Results from the Children's Health Study*. 113 ENVTL. HEALTH PERSPS. 1638 (2005).

[49] Catherine Karr et al., *Effects of Subchronic Exposure to Ambient Air Pollutants on Infant Bronchiolitis*, 165 AM. J. EPIDEMIOLOGY 553, 557 (2007).

[50] Robert E. Dales et al., *Gaseous Air Pollutants and Hospitalization for Respiratory Disease in the Neonatal Period*, 114 ENVTL. HEALTH PERSPS. 1751, 1754 (2006); Richard T. Burnett et al., *Association Between Ozone and Hospitalization for Acute Respiratory Diseases in Children Less than 2 Years of Age*, 153 AM. J. EPIDEMIOLOGY 444, 449 (2001).

developing asthma.[51] Asthmatic children also have increased hospitalization rates, more severe asthma attacks, and decreased pulmonary function when exposed to air pollution.[52] A study of 255 college freshmen similarly found that students who grew up in areas with more ambient ozone had decreased lung function, a risk factor for lung disease later in life.[53]

Older adults are susceptible to the adverse health effects of air pollution because they have a higher prevalence of pre-existing illness and the aging process has contributed to their sensitivity.[54] Healthy elderly adults can experience significant decreases in heart rate variability following PM exposure, which may induce adverse cardiovascular events.[55] PM can trigger hospitalization for

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[51] Rob McConnell et al., *Asthma in Exercising Children Exposed to Ozone: A Cohort Study*, 359 LANCET 386, 389-91 (2002).

[52] Leonardo Trasande & George D. Thurston, *The Role of Air Pollution in Asthma and Other Pediatric Morbidities*, 115 J. ALLERGY & CLINICAL IMMUNOLOGY 689, 691-96 (2005); Toby C. Lewis et al., *Air Pollution-Associated Changes in Lung Function Among Asthmatic Children in Detroit*, 113 ENVTL. HEALTH PERSPS. 1068, 1073 (2005); George D. Thurston et al., *Summertime Haze Air Pollution and Children with Asthma*, 155 AM. J. RESPIRATORY & CRITICAL CARE MED. 654, 659-60 (1997).

[53] Tager et al., *supra* note 26 at 756-58.

[54] INTEGRATED SCIENCE ASSESSMENT FOR PM, *supra* note 2, at 8-3.

[55] R.B. Devlin et al., *Elderly Humans Exposed to Concentrated Air Pollution Particles Have Decreased Heart Rate Variability*, 21 EUROPEAN RESPIRATORY J. 76s, 79s (2003).

congestive heart failure among the elderly,[56] and low-level ozone exposure increases emergency room visits for respiratory illnesses among older populations.[57]

Also vulnerable are non-elderly individuals with pre-existing medical conditions. Adults with chronic obstructive pulmonary disease are particularly sensitive to ozone exposure,[58] and patients with cystic fibrosis are at greater risk of pulmonary exacerbations and significant loss in lung function when exposed to air pollution.[59] Individuals with diabetes are especially sensitive to air pollution as well, in particular because of increased risks from pollution-associated cardiovascular events.[60]

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[56] Gregory Wellenius et al., *Particulate Air Pollution and the Rate of Hospitalization for Congestive Heart Failure Among Medicare Beneficiaries in Pittsburgh, Pennsylvania*, 161 AM. J. EPIDEMIOLOGY 1030, 1030 (2005).

[57] Ralph J. Delfino et al., *Emergency Room Visits for Respiratory Illnesses Among the Elderly in Montreal: Association with Low Level Ozone Exposure*, 76 ENVTL. RES. 67, 75 (1998).

[58] Helene Desqueyroux et al., *Effects of Air Pollution on Adults with Chronic Obstructive Pulmonary Disease*, 6 ARCHIVES ENVTL. HEALTH 554, 554 (2002).

[59] Christopher H. Goss et al., *Effect of Ambient Air Pollution on Pulmonary Exacerbations and Lung Function in Cystic Fibrosis*, 169 AM. J. RESPIRATORY & CRITICAL CARE MED. 816, 816 (2004).

[60] Marie S. O'Neill et al., *Air Pollution and Inflammation in Type 2 Diabetes: A Mechanism for Susceptibility*, 64 OCCUPATIONAL & ENVTL. MED. 373, 376 (2007); Marie S. O'Neill et al., *Diabetes Enhances Vulnerability to Particulate Air Pollution-Associated Impairment in Vascular Reactivity and Endothelial Function*, 111 CIRCULATION 2913, 2918 (2005);

II. SIGNIFICANT PUBLIC HEALTH BENEFITS WILL RESULT FROM EPA'S IMPLEMENTATION OF THE TRANSPORT RULE

Imposing the air pollution restrictions embodied in the Transport Rule would reduce precursor emissions substantially, thereby removing a significant amount of PM and ozone from the ambient air downwind. Numerous studies demonstrate that decreases in air pollution, like PM and ozone, improve human health and increase average life expectancy.[61] Reduced exposure is associated with reduced mortality from various causes, including cardiovascular disease and lung cancer.[62] Even incremental reductions at lower

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Antonella Zanobetti & Joel Schwartz, *Are Diabetics More Susceptible to the Health Effects of Airborne Particles?*, 164 AM. J. RESPIRATORY & CRITICAL CARE MED. 831, 832-33 (2001).

[61] *See, e.g.*, Joel Schwartz et al., *The Effect of Dose and Timing of Dose on the Association between Airborne Particles and Survival*, 116 ENVTL. HEALTH PERSPS. 64, 68 (2008) (finding no evidence of a threshold in the association between $PM_{2.5}$ exposure and risk of death, suggesting efforts to reduce PM as low as feasible are most effective way to improve public health); Andrew W. Correia et al., *Effects of Air Pollution Control on Life Expectancy in the United States: An Analysis of 545 U.S. Counties for the Period from 2000 to 2007*, 24 EPIDEMIOLOGY 23, 23 (2013).

[62] Francine Laden et al., *Reduction in Fine Particulate Air Pollution and Mortality: Extended Follow-Up for the Harvard*

concentrations can save lives.[63] In 2009, researchers compared data on PM pollution and life expectancy in fifty-one U.S. cities between 1980 and 2000.[64] After controlling for socioeconomic, demographic, and lifestyle factors like smoking, the study revealed that decreasing $PM_{2.5}$ by ten micrograms per cubic meter could increase life expectancy by between six months and two years. The study also demonstrated that reduced pollution accounted for as much as fifteen percent of the overall increase in life expectancy seen in those cities. Other studies also show that limiting air pollution can produce substantial improvements in public health in a short period of time.[65] Decreases in long-term exposure reduce mortality rates to a

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Six Cities Study, 173 AM. J. RESPIRATORY & CRITICAL CARE MED. 667, 668-69 (2006).

[63] *Id.*

[64] C. Arden Pope III et al., *Fine-Particulate Air Pollution and Life Expectancy in the United States*, 360 NEW ENG. J. MED. 371, 384-85 (2009).

[65] Antonella Zanobetti & Joel Schwartz, *The Effect of Fine and Coarse Particulate Air Pollution on Mortality: A National Analysis*, 117 ENVTL. HEALTH PERSPS. 898, 902 (2009); Robin C. Puett et al., *Chronic Particulate Exposure, Mortality and Coronary Heart Disease in the Nurses' Health Study*, 168 AM. J. EPIDEMIOLOGY 1161, 1167 (2008); Antonella Zanobetti et al., *Particulate Air Pollution and Survival in a COPD Cohort*, 7 ENVTL. HEALTH 48, 55-56 (2008); Sara H. Downs et al., *Reduced Exposure to PM_{10} and Attenuated Age-Related Decline in Lung Function*, 357 NEW ENG. J. MED. 2338, 2346 (2007).

greater extent than previously believed.[66]

EPA has estimated that the Transport Rule would prevent between 13,000 and 34,000 premature deaths annually, measured against a state of affairs in which the Clean Air Interstate Rule (CAIR) does not govern interstate air pollution. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,309 (Aug. 8, 2011). Measured against the framework established by CAIR, it is estimated that the Transport Rule—a tougher approach than CAIR—would prevent an additional 2,550 to 6,560 premature deaths annually. Response of Intervenors American Lung Ass'n, Clean Air Council, Environmental Defense Fund, Natural Resources Defense Council, & The Sierra Club in Opposition to the Motion of Southwestern Public Service Co. for a Partial Stay of the Transport Rule Ex. 3, at 12-13, *EME Homer City Generation, L.P. v.*

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[66] *See* Roman et al., *supra* note 5, at 2268. EPA has tightened several different NAAQS in recent years, but there is still a positive correlation between better health and reduced air pollution at levels below the NAAQS. EPA even recognized this point in its most recent decision to tighten the standard for 24-hour $PM_{2.5}$. *See* National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3,086, 3,098 (Jan. 15, 2013) ("evidence- and risk-based approaches using information from epidemiological studies to inform decisions on $PM_{2.5}$ standards are complicated by the *recognition that no population threshold, below which it can be concluded with confidence that $PM_{2.5}$-related effects do not occur, can be discerned from the available evidence.*") (emphasis added).

EPA, 696 F.3d 7 (D.C. Cir. 2011) (No. 11-1302) (Declaration of David Schoengold) [hereinafter Schoengold Declaration].

III. THE TRANSPORT RULE IS NECESSARY TO IMPROVE AMERICANS' AIR QUALITY AND HEALTH WITHOUT DELAY

Respondents make several spurious points in support of their contention that the Transport Rule is not necessary for achieving reductions in harmful air pollution. Respondents suggest—wrongly—that the CAIR framework currently in place is sufficient to achieve attainment in downwind states as required under the Clean Air Act. Br. in Opp'n of Indust. & Labor Resp'ts at 30-31. Respondents also point out—wrongly again—that EPA "design value" data show that air pollution concentrations are declining even without implementation of the Transport Rule. *Id.* at 31.

a. Without the Transport Rule, EPA Will Have No Workable Regulatory Framework for Implementing the Clean Air Act's Good Neighbor Provision

CAIR was to be a comprehensive regulatory framework for implementing the CAA's requirement that upwind states act as "good neighbors" to downwind states by limiting cross border air pollution. Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,170 (May 12, 2005). Its requirements

reflect 1997 NAAQS for both PM and ozone, *id.* at 25,168, both of which have since been superseded by more protective standards. *See* National Air Quality Standards for Ozone, 73 Fed. Reg. 16,436, 16,471 (Mar. 27, 2008) ("the current [ozone] standard . . . does not provide sufficient protection"); National Air Quality Standards for Particulate Matter, 71 Fed. Reg. 61,144, 61,155 (Oct. 17, 2006) ("the available information clearly calls into question the adequacy of the current suite of $PM_{2.5}$ standards and provides strong support for revising the current suite of $PM_{2.5}$ standards to provide increased public health protection."). In 2008, the D.C. Circuit found "more than several fatal flaws in [CAIR]." *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008). Rather than vacate CAIR, however, the D.C. Circuit limited its life, making it a stopgap that will cease to operate once EPA issues a regulatory replacement. *North Carolina v. EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008). EPA has sought to replace CAIR with the Transport Rule, which would reduce air pollution and improve public health to a greater degree than CAIR. Schoengold Declaration at 12-13; 76 Fed. Reg. at 48, 209.

The D.C. Circuit's decision to vacate the Transport Rule effectively guarantees that millions of Americans will spend years needlessly breathing more heavily polluted air and suffering the predictable health consequences. This guarantee takes two forms. First, as EPA has explained, the decision effectively delays those emission reductions that upwind states must undertake in order for downwind states to attain the NAAQS—particularly

for ozone and PM. EPA Pet. at 29-30. And second, by instructing EPA to craft yet another novel replacement for CAIR, the decision ensures that the weaker and flawed CAIR will remain in place for the months and years EPA will require to comply with that instruction. Each year that CAIR remains in place will see an estimated 2,550 to 6,560 more premature deaths than would occur under the Transport Rule. Schoengold Declaration at 12-13.

b. Air Pollution Concentrations Are Rising Once Again

EPA regularly publishes air pollution "design values"—data reflecting official concentrations of particular pollutants, such as PM and ozone. These data report concentrations of pollution based on community monitors, and those concentrations, in turn, reflect a host of factors, including emissions from anthropogenic and natural sources and the impact of weather patterns and temperature over each three-year period studied.[67] Design values for most U.S. regions fell from the 2007-2009 period to the 2009-2011 period, but, as evident from EPA's 2010-2012 design values, ozone levels have risen

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[67] *See generally* OFFICE OF AIR QUALITY PLANNING & STANDARDS EMISSIONS, MONITORING, AND ANALYSIS DIVISION, U.S. ENVTL. PROT. AGENCY, GUIDANCE ON THE USE OF MODELS AND OTHER ANALYSES IN ATTAINMENT DEMONSTRATIONS FOR THE 8-HOUR OZONE NAAQS, EPA-454/R-05-002 (2005) (describing EPA's approach to air quality monitoring).

sharply.[68] For example, in Washington, D.C. (a nonattainment area for ozone), concentrations of ozone have increased nine percent since 2009.[69]

These recent EPA data show that air pollution concentrations can rise as well as fall under CAIR and so belie Respondents' contention that EPA has failed to demonstrate why the Transport Rule is necessary. *See* Br. in Opp'n of Indust. & Labor Resp'ts 30-31. Respondents ask this Court to look closely at the EPA data showing an earlier dip in pollution concentrations, but Respondents ignore EPA's more recent data, which show a significant

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[68] U.S. Envtl. Prot. Agency, Design Values—Period Ending 2012, Ozone Detailed Information, tbl. 3a, *available at* http://www.epa.gov/airtrends/values.html (scroll to row "2012" under "Design Value period ending" then click on "Ozone Detailed Information" under "Design Value Reports"). Notably, the higher ambient temperatures that likely contributed to this rise in 2012 are expected to persist—and continue increasing—in future years. Noah S. Diffenbaugh & Martin Scherer, *Likelihood of July 2012 U.S. Temperatures in Preindustrial and Current Forcing Regimes*, at s6, s8-s9, *and* Thomas R. Knutson et al., *The Extreme March-May 2012 Warm Anomaly over the Eastern United States: Global Context and Multimodel Trend Analysis*, at s13, s16, *in Explaining Extreme Events of 2012 from a Climate Perspective*, 94 BULL. AM. METEOROLOGICAL SOC'Y (SPECIAL SUPP.) (Thomas C. Peterson et al. eds., 2013), *available at* http://www.ametsoc.org/2012extremeeventsclimate.pdf. This warming trend, with its promise of higher rates of ozone, makes it all the more pressing to reduce ozone precursors below levels currently set by CAIR.

[69] U.S. Envtl. Prot. Agency, Design Values—Period Ending 2012, Ozone Detailed Information, tbl. 3a.

rise in ozone concentrations.[70] Contrary to Respondents' characterization of air pollution trends, EPA is right to push for implementation of the Transport Rule, because the problem of air pollution that harms and sometimes kills Americans urgently needs the stronger solution the Transport Rule provides.

CONCLUSION

For the foregoing reasons, *amicus* ATS urges this Court to reverse the D.C. Circuit's decision in order to protect the health of millions of Americans.

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[70] U.S. Envtl. Prot. Agency, Design Values—Period Ending 2012, Ozone Detailed Information, tbl. 3a.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
SEP 11 2013
OFFICE OF THE CLERK

Nos. 12-1182 & 12-1183

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*

AMERICAN LUNG ASSOCIATION, *ET AL.*,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF NEITHER PARTY

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QUESTIONS PRESENTED

These two consolidated cases present both merits and jurisdictional questions, with the latter hinging on whether review was available, given (a) failure to raise the relevant merits issues during the comment period, and (b) 42 U.S.C. §7607(d)(7)(B)'s limitation on review to issues presented during the rulemaking. This *amicus* brief focuses only on the jurisdictional question, including the implications of §7607(d)(7)(B) on review when after-arising grounds provide a basis for revisiting existing Clean Air Act rules.

No. 12-1182

The Clean Air Act, 42 U.S.C. 7401 *et seq.* (Act or CAA), requires the Environmental Protection Agency (EPA) to establish National Ambient Air Quality Standards (NAAQS) for particular pollutants at levels that will protect the public health and welfare. 42 U.S.C. 7408, 7409. "[W]ithin 3 years" of "promulgation of a [NAAQS]," each State must adopt a state implementation plan (SIP) with "adequate provisions" that will, inter alia, "prohibit[]" pollution that will "contribute significantly" to other States' inability to meet, or maintain compliance with, the NAAQS. 42 U.S.C. 7410(a)(1), (2)(D)(i)(I). If a State fails to submit a SIP or submits an inadequate one, the EPA must enter an order so finding. 42 U.S.C 7410(k). After the EPA does so, it "shall promulgate a [f]ederal implementation plan" for that State within two years. 42 U.S.C. 7410(c)(1).

The questions presented are as follows:

(1) Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.

(2) Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.

(3) Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

No. 12-1183

The Clean Air Act's "Good Neighbor" provision requires that state implementation plans contain "adequate" provisions prohibiting emissions that will "contribute significantly" to another state's nonattainment of health-based air quality standards. 42 U.S.C. 7410(a)(2) (D)(i). A divided D.C. Circuit panel invalidated, as contrary to statute, a major EPA regulation, the Transport Rule, that gives effect to the provision and requires 27 states to reduce emissions that contribute to downwind states' inability to attain or maintain air quality standards. The questions presented are:

(1) Whether the statutory challenges to EPA's methodology for defining upwind states' "significant contributions" were properly before the court, given the failure of anyone to raise these objections at all,

let alone with the requisite "reasonable specificity," "during the period for public comment," 42 U.S.C. 7607(d)(7)(B);

(2) Whether the court's imposition of its own detailed methodology for implementing the Good Neighbor provision violated foundational principles governing judicial review of administrative decision - making;

(3) Whether an upwind state that is polluting a downwind state is free of any obligations under the Good Neighbor provision unless and until EPA has quantified the upwind state's contribution to downwind states' air pollution problems.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit membership organization headquartered in McLean,

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[1] *Amicus* APA Watch files this brief with the consent of all parties; the parties have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

Virginia. APA Watch has participated as *amicus curiae* before this Court and the Courts of Appeals on both justiciability and the Clean Air Act ("CAA"), including in *Stormans Inc. v. Seleky*, No. 07-36039 (9th Cir.); *Envtl. Defense v. Duke Energy Corp.*, No. 05-848 (U.S.); *Astra USA, Inc. v. Santa Clara County, Cal.*, No. 09-1273 (U.S.); *Douglas v. Independent Living Ctr. of Southern California, Inc.*, Nos. 09-958, 09-1158, 10-283 (U.S.). In addition, APA Watch members seek to compel the Environmental Protection Agency ("EPA") to revisit CAA rules and orders outside CAA §307(b)'s 60-day window for judicial review, 42 U.S.C. §7607(b), which implicates the same statutory text and legislative history on the question of CAA issue-exhaustion that petitioners present here. Accordingly, APA Watch has a direct and vital interest in the issues raised here.

STATEMENT OF THE CASE

As relevant to this *amicus* brief, this case presents the jurisdictional question whether the industry petitioners below ("Industry") and the D.C. Circuit could reach an issue that no party pressed in their comments to EPA. *Amicus* APA Watch takes no position on that issue *per se*, but rather outlines the related issues of whether and when parties can seek renewed review under the CAA for after-arising grounds (*i.e.*, grounds that arise outside §307(b)'s 60-day window for judicial review and outside the comment period. *See* 42 U.S.C. §7607(b)(1), 7607(d)(7)(B). Although these issues may not appear to be conceptually related to the question presented here, Congress enacted §307(d)(7)(B) for the very reason of channeling the process for review of after-

arising grounds.

Constitutional Background

Absent a waiver of sovereign immunity, federal agencies are jurisdictionally immune from suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). Statutes that allow judicial review obviously waive sovereign immunity, Louis L. Jaffee, *The Right to Judicial Review I*, 71 HARV. L. REV. 401, 432 (1958) ("If a statute provides for judicial review the consent has, of course, been given"), at least for the scope of review that the statute grants.

Statutory Background

In 1970, Congress applied the precursor of current §307(b) to judicial review of a subset of CAA actions, PUB. L. NO. 91-604, §12(a), 84 Stat. 1676, 1707 (1970), which the 1977 amendments expanded to apply to virtually all final CAA actions. PUB. L. NO. 95-95, §305(c)(1)-(3), 91 Stat. 685, 776 (1977). CAA §307(b)'s central provisions are (a) direct review in the courts of appeal; (b) review of nationally applicable actions exclusively in the D.C. Circuit, with review of regionally applicable actions in the court of appeals for the relevant circuit; and (c) the jurisdictional requirement to petition for review in the relevant court of appeals within 60 days of EPA's publishing notice of its action in the *Federal Register* or within 60 days of after-arising grounds. 42 U.S.C. §7607(b)(1). In addition, §307(b)(2) prohibits courts from reviewing in an enforcement proceeding any EPA action for which review could have been had

under §307(b)(1). 42 U.S.C. §7607(b)(2).[2] Subsection 307(d) provides a hybrid judicial-review procedure for many (but not all) EPA rulemakings, 42 U.S.C. §7607(d), which differs in some respects from the more general provisions of the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"). Where those CAA-specific revisions apply, judicial review is available only on issues first presented to EPA. 42 U.S.C. §7607(d)(7)(B).

In *Olijato Chapter, Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975) ("*Navajo Tribe*"), the D.C. Circuit addressed the interplay between §307(b)(1) and the APA procedure to address after-arising grounds, 5 U.S.C. §553(e). There, the Tribe sought to challenge an EPA rule outside §307(b)(1)'s window, but based on after-arising information. The Tribe had filed suit in district court and, based on that court's determining it lacked jurisdiction, also filed a belated petition for review in the court of appeals. 515 F.2d at 658-59. *Navajo Tribe* held that – in order to present such information to EPA in a manner that the Court of Appeals could review – one first must petition EPA under §553(e) to present their issues to the Agency and then petition for review under the Clean Air Act on the "grounds" of EPA's denying the administrative petition. 515 F.2d at 666.[3]

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[2] Before 1977, §307(b)(1)'s deadline was 30 days. PUB. L. NO. 91-604, §12(a), 84 Stat. at 1707. For consistency, APA Watch refers to §307(b)(1)'s 60-day window throughout this brief.

[3] In 1970, Congress amended S. 4358 in conference to require suing on after-arising *grounds* (*e.g.*, petition denials), not "whenever ... significant new information has become

In broadening §307(b)'s scope in the 1977 amendments, Congress expressly ratified the *Navajo Tribe* approach. H.R. REP. 94-1175, 264 (1976); S. REP. 95-294, 323 (1977). In addition, Congress rejected *dicta* from *Investment Co. Inst. v. Bd. of Governors, Fed'l Reserve Sys.*, 551 F.2d 1270, 1280-81 (D.C. Cir. 1977) ("*Investment Co.*") that might allow escaping §307(b)'s time bar for "an undefined legitimate excuse." S. REP. 95-294, at 322. By negative implication, Congress did not reject the *Investment Co.* holding that such petitions are *required* for a party to challenge a rule that it lacked a ripe claim to challenge within the 60-day window or that seeks to raise an issue that arose after EPA acted on its original rule or order.[4]

SUMMARY OF ARGUMENT

Amicus APA Watch takes no position on either the jurisdictional question presented (whether issue exhaustion under §307(d)(7)(B) is jurisdictional) or on the merits questions presented. Instead, this *amicus* brief explains §307(d)(7)(B)'s legislative history and its relevance to renewed review – *i.e.*,

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available." *Navajo Tribe*, 515 F.2d at 660 (*quoting* S. 4358, 91st Cong., 2d Sess., §308(a) (1970)).

[4] Notwithstanding *Navajo Tribe* and the 1977 amendment's legislative history, the D.C. Circuit subsequently held that parties cannot seek judicial review of petition denials. *Nat'l Mining Ass'n v. Dep't of Interior*, 70 F.3d 1345 (D.C. Cir. 1995); *Am. Road & Transportation Builders Ass'n v. EPA*, 588 F.3d 1109, 1114 (D.C. Cir. 2009). The circuits are split on that issue, *see, e.g., Union Elec. Co. v. EPA*, 515 F.2d 206, 220 (8th Cir. 1975), and the issue is before this Court on petition for a writ of *certiorari* in *Am. Road & Transportation Builders Ass'n v. EPA*, No. 13-145 (U.S.).

outside §307(b)'s 60-day window – of EPA rules and orders based on after-arising grounds. On that issue, such review predated the 1977 amendments that added §307(d)(7)(B) and were the very reason that Congress added §307(d)(7)(B), which makes clear that the Court should preserve (or at least not foreclose) such review under that congressional intent and the policy against repeals by implication (Section II.A). In addition, denying or foreclosing that review would violate due process and further defeat congressional intent by allowing review *outside the CAA framework* under the APA and in equity (Section II.B). In addition, APA Watch also argues that neither the APA nor other issue-exhaustion statutes provide useful guidelines here for CAA review because of difference between the CAA on the one hand and the APA (Section I.A) and the other issue-exhaustion statutes on the other hand (Section I.B).

ARGUMENT

I. NEITHER THE APA NOR NON-CAA ISSUE-EXHAUSTION STATUTES NECESSARILY RESOLVE THIS ISSUE UNDER THE CAA

Amicus APA Watch respectfully submits that the Court should use care in generalizing principles from the APA and administrative-law generally on the one hand and other statutes with issue-exhaustion provisions on the other hand. In both situations (and particularly the latter), neither non-statutory review under the APA or common law nor statutory review under statutes that differ from the CAA will necessarily provide a rule of decision for judicial review under the CAA.

For example, §307(d) and the APA are similar in many respects, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478 (2001) (standard of review), but they also differ. Indeed, Congress wrote §307(d) precisely to override the APA template in those areas where the APA and §307(d) differ. As such, while the APA may guide the Court's understanding of §307(d) in some respects, the APA does not apply here where APA and CAA review do not align:

> The meaning and applicability of [the first statute] are useful guides in construing [the second statute], therefore, only to the extent that the language and history of [the second statute] do not suggest a contrary interpretation.

North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 529-30 (1982). While *amicus* APA Watch will defer to the parties to establish the rule of decision in this case, Section II, *infra*, will discuss issues of CAA review that the Court should consider for the wider impact of its decision here.

A. The APA Does Not Necessarily Resolve the Question Presented Here

Under *Sims v. Apfel*, 530 U.S. 103 (2000), non-adversarial proceedings like most rulemakings would provide a much weaker case for judicially requiring exhaustion than would adversarial proceedings. *Sims* cautions against applying APA principles here, and it also cautions against too readily adopting holdings from adversarial proceedings into litigation that does not involve an adversarial proceeding.

1. If It Arose under the APA, this Case Would Present a Weak Case for Issue Exhaustion

To the extent that issue exhaustion principles apply under the APA and common law, they apply judicially, under general principles of administrative law. This Court's recent decision in *Sims* is the leading authority, and it ties the question to the adversarial nature of the agency proceedings:

> [C]ourts require administrative issue exhaustion "as a general rule" because it is usually "appropriate under [an agency's] practice" for "contestants in an adversary proceeding" before it to develop fully all issues there. ... But, as *Hormel* and *L. A. Tucker Truck Lines* suggest, the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding. Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems to us that the rationale for requiring issue exhaustion is at its greatest. *Hormel*, *L.A. Tucker Truck Lines*, and *Aragon* each involved an adversarial proceeding. ... Where, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker.

Sims, 530 U.S. at 110 (second alteration in original, citations omitted). As used in *Sims* and its earlier

cited precedents, an "adversarial administrative proceeding" entails elements of due process – *e.g.*, the ability to cross examine witnesses – that are wholly absent from most APA rulemakings. Indeed, even some APA hearings are not adversarial. *See, e.g., Nat'l Ass'n of Psychiatric Treatment Ctrs. for Children v. Mendez,* 857 F. Supp. 85, 89-90 (D.D.C. 1994); *Norwegian Nitrogen Prod. Co. v. U.S.*, 288 U.S. 294, 317 (1933) (because "the word 'hearing' as applied to administrative proceedings has been thought to have a broader meaning," "[a]ll depends upon the context").

Specifically, an "adversary proceeding [includes] the attendant rights to counsel, confrontation, cross-examination, and compulsory process." *Ellis v. District of Columbia,* 84 F.3d 1413, 1422 (D.C. Cir. 1996); *see also U.S. v. Boney,* 68 F.3d 497, 502 (D.C. Cir. 1995); *Communications Satellite Corp. v. Fed'l Communications Comn'n,* 611 F.2d 883, 887 (D.C. Cir. 1977); *Delta Found. v. U.S.*, 303 F.3d 551, 561-62 (5th Cir. 2002); *Coalition for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 465-66 (6th Cir. 2004); *Gambill v. Shinseki,* 576 F.3d 1307, 1326 (Fed. Cir. 2009) (Bryson, J., concurring) (collecting cases); *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970). With APA actions that are not adversarial proceedings, the case for *judicially imposing* issue exhaustion is "much weaker" under *Sims.*

Sims undermines EPA's citation to decisions that involved adversarial proceedings because – at least under the APA – the case for issue exhaustion is more forceful with adversarial proceedings than it would be here, with this non-adversarial rulemaking.

See, e.g., EPA Br. at 35 (*citing U.S. v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952)); *cf. Sims*, 530 U.S. at 110 ("*L.A. Tucker Truck Lines* ... involved an adversarial proceeding"). This Court cannot necessarily draw inferences from the APA, and particularly not from APA situations in which (unlike here) the agency provided an adversarial proceeding.

2. If the APA Applied, Industry Could Excuse Exhaustion Based on the Futility of Seeking Review from EPA

If the Court holds that general administrative-law decisions apply to this dispute, EPA's rejection of the industry position on the merits, EPA Br. at 33-55, would render exhaustion futile:

> [I]n view of Attorney General's submission that the challenged rules of the prison were "validly and correctly applied to petitioner," requiring administrative review through a process culminating with the Attorney General 'would be to demand a futile act."

McCarthy v. Madigan, 503 U.S. 140, 148 (1992) (*quoting Houghton v. Shafer*, 392 U.S. 639, 640 (1968)); *cf. McKart v. U.S.*, 395 U.S. 185, 197-99 (1969) (exhaustion not required if question "solely one of statutory interpretation" where "the proper interpretation [was] certainly not a matter of [agency] discretion"). Here, if EPA indeed decided its merits views, there would be no point to asking that industry raise the issues with EPA.

B. Non-CAA Issue-Exhaustion Statutes Do Not Resolve the Question Presented Here

The argument against relying too heavily on general APA and administrative-law issues is even stronger when it comes to other statutes that provide issue-exhaustion principles as part of their statutory review.[5] Here, Congress is even less likely to have intended courts to interpret different statutory text to mean the *same* thing.

Although it has on occasion strictly enforced issue-exhaustion statutes, *see, e.g.*, *EEOC v. FLRA*, 476 U.S. 19, 23-24 (1986), this Court has not yet ruled on the issue-exhaustion criteria presented by §307(d)(7)(B). While the Court perhaps can draw some general principles from its precedents on other issue-exhaustion statutes, *amicus* APA Watch respectfully submits that many of those decisions do not generalize to this CAA context because the statutes at issue in those other cases differed from the CAA statute at issue here.

For example, the issue-exhaustion statute in *EEOC v. FLRA* was somewhat stricter than §307(d):

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[5] The Court perhaps should distinguish between nonstatutory review and special forms of statutory review, as the enactment of "statutes" such as the APA has rendered the term "nonstatutory" something of a "misnomer." *Air New Zealand Ltd. v. C.A.B.*, 726 F.2d 832, 836-37 (D.C. Cir. 1984) (Scalia, J.); *cf. generally* Clark Byse & Joseph V. Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 HARV. L. REV. 308 (1967).

> "[no] objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances."

EEOC v. FLRA, 476 U.S. at 23 (*quoting* 5 U.S.C. §7123(c)) (alteration in *EEOC v. FLRA*). As the Court noted, this language is identical to §10(e) of the National Labor Relations Act, *id.* (*citing* 29 U.S.C. §160(e)), which jurisdictionally precludes courts from considering issues not raised before the agency. *Id.* (*citing Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982)). If these authorities applied here, they would help EPA greatly.

But Congress did not model §307(d)(7)(B) on §10(e) of the National Labor Relations Act. First, the CAA requires only that it must have been "impracticable to raise [a timely] objection," 42 U.S.C. §7607(d)(7)(B), which is less stringent than "extraordinary circumstances." *EEOC v. FLRA*, 476 U.S. at 23 (*quoting* 5 U.S.C. §7123(c)). Moreover, whereas the latter "speaks to courts, not parties," *EEOC v. FLRA*, 476 U.S. at 23, §307(d)(7)(B) speaks only to what issues "may be raised during judicial review," presumably by "the person raising an objection." 42 U.S.C. §7607(d)(7)(B). Under that less-stringent restriction, courts may feel free to insert issues *sua sponte* that the parties could not themselves raise.

II. CONGRESS INTENDED REVIEW UNDER §307 TO ALLOW REVISITING EPA RULES BASED ON AFTER-ARISING GROUNDS

Although this *amicus* brief expresses no view on

whether Industry here can avail itself of §307's provisions for seeking renewed review, *amicus* APA Watch respectfully submits that this Court's decision should recognize – or, at least, not foreclose – the CAA's flexibility for seeking renewed review under §307(b), which was the genesis of §307(d)(7)(B) in the 1977 CAA amendments. Because the jurisdictional question presented is sufficiently close to the question of whether and when parties can seek renewed review, APA Watch respectfully files this *amicus* brief as a protective matter to advise this Court that the integrally related issues of renewed review under §307(b).

A. Congress Intended §307(d)(7)(B) to Preserve and Channel the Ability to Seek Renewed Review Based on After-Arising Grounds

As indicated by both §307(d)(7)(B)'s legislative history and the strong disfavor for repeals by implication, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007), judicial review based on after-arising grounds should *remain* available under §307(b).[6] Indeed, although repeal by implication requires that "the intention of the legislature to repeal [is] clear and manifest," *id.*, the policy against repeals by implication is *even stronger* for judicial review: "this canon of

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[6] Under *Navajo Tribe*, 515 F.2d at 666-67, such review was available prior to the 1977 amendments, and nothing in the 1977 amendments repealed that review, except for instances of "an undefined legitimate excuse" under the *Investment Co. dictum*. S. REP. 95-294, at 322; *cf. Investment Co.*, 551 F.2d at 1280-81.

construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted); *cf.* 5 U.S.C. §559; *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999). Thus, assuming *arguendo* that §307(d)(7)(B) is jurisdictional here, this Court must not inadvertently suggest that §307 limits *renewed review*, even if §307(d)(7)(B) limits review here.

With that background, the only two effects of §307(d)(7)(B) on the availability for renewed review are that (1) renewed review is unavailable under the *Investment Co. dictum* about "an undefined legitimate excuse" and instead requires (minimally) that it must have been "impracticable" to have raised the issue within the original 60-day window;[7] and (2) issue exhaustion applies to renewed review, so that parties must first raise their issues administratively with EPA and await a denial of their administrative petition before seeking judicial review. *See* 42 U.S.C. §7607(d)(7)(B); S. REP. 95-294, at 322-23; H.R. REP. 94-1175, at 264. As indicated, *amicus* APA expresses no view on whether Industry here can avail itself of an opportunity for renewed review.

B. Renewed Review Based on After-Arising Grounds Provides a Necessary Safety Valve under the Due Process Clause

Allowing renewed review of after-arising grounds

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[7] As indicated in Section I.B, *supra*, CAA's "impracticable" test is less stringent that the "extraordinary circumstances" that some other issue-exhaustion statutes require.

serves two important goals, one constitutional and one statutory. Both reasons caution against this Court's finding §307 to bar review permanently for any issue on which a party misses – for whatever reason – §307(b)'s original 60-day window.

First, it would deny due process for an agency action taken, for example, when a prospective plaintiff or petitioner lacked an Article III case or controversy to bind entities because their claims ripened or arose more than 60-odd days after EPA acted. This Court has noted without resolving that due-process issues raise by §307(b)(2)'s closing review *in enforcement actions* of EPA rules that could have been had under §307(b)(1). *See* 42 U.S.C. §7607(b)(2); *Adamo Wrecking Co. v. U.S.*, 434 U.S. 275, 307 n.* (1978); *Harrison v. PPG Indus.*, 446 U.S. 578, 607 n.9 (1980). When a party with an Article III case or controversy that is *not an enforcement action* seeks to have EPA revisit a prior rule or order, §307(b)(2) does not apply by its terms, but the same due-process issues still arise. Indeed, the issues are even stronger because §307(b)(2) negatively implies that renewed review *outside enforcement actions* should be available. Were it otherwise, §307(b)(2) would be mere surplusage.

Second, if review is not available under §307 in the D.C. Circuit for nationally applicable rules, review would be available in equity in every district court nationwide, *Leedom v. Kyne*, 358 U.S. 184, 188-90 (1958) (allowing nonstatutory equitable review, notwithstanding that the statute in question

impliedly prohibits judicial review[8]); *cf.* 5 U.S.C. §703 (APA review available "in the absence or inadequacy" of "the special statutory review proceeding relevant to the subject matter in a court specified by statute"), thereby defeating the nationwide uniformity that Congress intended §307(b) to provide. *Adamo Wrecking Co.*, 434 U.S. at 283-84 (entrusting CAA review to the D.C. Circuit to "insur[e] that [CAA's] substantive provisions ... would be uniformly applied" nationwide). Renewed review under §307 ensures that parties can seek EPA review administratively and then seek judicial review in the appropriate Court of Appeals in the event that EPA denies the requested relief.

CONCLUSION

Although it takes no position how this Court should resolve the jurisdictional question presented by §307(d)(7)(B), *amicus* APA Watch respectfully submits that this Court's decision should not lightly foreclose renewed judicial review for after-arising grounds if the Court finds §307(d)(7)(B) to be jurisdictional.

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[8] The CAA does not *expressly* limit judicial review to §307, 42 U.S.C. §7607(e) ("[n]othing in this chapter shall be construed to authorize judicial review of [EPA] regulations or orders ... under this chapter, except as provided in this section," which does not restrict review not based "on this chapter" (*i.e.*, the CAA) such as the APA and equity), so *Kyne* jurisdiction would apply in the absence of §307 jurisdiction where the prospective plaintiff or petitioner could not have raised its after-arising grounds during §307(b)'s original 60-day window. *Board of Governor's of the Federal Reserve System v. MCorp Financial*, 502 U.S. 32, 43-44 (1991).

September 11, 2013

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AMICUS CURIAE BRIEF

RECORD AND BRIEFS

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Petitioners,

v.

EME HOMER CITY GENERATION, L.P., ET AL.,
Respondents.

AMERICAN LUNG ASSOCIATION, ET AL.,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* ATMOSPHERIC SCIENTISTS AND AIR QUALITY MODELING EXPERTS IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae atmospheric scientists and air quality modeling experts are Gregory Carmichael, William Chameides, Russell Dickerson, Arlene Fiore, Tracey Holloway, Mark Jacobson, Paul Miller, Mehmet Odman, Noelle Eckley Selin, Sanford Sillman, Scott Spak, and Jason West. The *Amici* wish to supply the Court with an understanding of the complexity of interstate air transport and air quality modeling, and explain why the approach EPA used to quantify upwind states' significant contributions to nonattainment and maintenance problems in downwind states and determine upwind states' emissions reduction obligations under the Transport Rule is a scientifically reasonable way to meet the requirements of the good neighbor provision of the Clean Air Act. The *Amici* also wish to explain why it would be difficult (if not impossible) to design a rule that meets the lower court's "red lines" or constraints on EPA's authority to regulate the interstate transport of air pollutants and why there is no scientifically justified reason for the lower court to substitute its preferred approach for the one EPA used.

Amicus Dr. Gregory Carmichael is the Karl Kammermeyer Professor of Chemical and Biochemical Engineering at the University of Iowa and co-director of Iowa's Center for Global and

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[1] No counsel for any party in this case has authored this brief in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. Written consents from the parties to the filing of this brief are on file with the Clerk.

Regional Environmental Research. He has M.S. and Ph.D. degrees in Chemical Engineering from the University of Kentucky. Dr. Carmichael has done extensive research related to air quality and its environmental impacts and is a leader in the development and application of chemical transport models at scales ranging from local to global. His research has involved the development of innovative modeling tools, including techniques to optimally integrate measurements and models via formal chemical data assimilation. He serves as chair of the Scientific Advisory Group for the World Meteorological Organization Global Atmospheric Watch Urban Meteorology and Environment project, which is focused on building capacity worldwide to improve air quality forecasts and related services. He is also a fellow of the American Institute of Chemical Engineering and a recent recipient of the Lawrence K. Cecil Award in Environmental Chemical Engineering, which recognizes an individual's outstanding chemical engineering contribution and achievement in the preservation or improvement of the environment.

Amicus Dr. William L. Chameides is Dean of the Nicholas School of the Environment at Duke University. He has a Ph.D. from Yale University and has combined more than 30 years in academia as a professor, researcher, teacher, and mentor with a 3-year stint in the NGO world as the chief scientist of the Environmental Defense Fund. Dr. Chameides' research focuses on the atmospheric sciences, elucidating the causes of and remedies for global, regional, and urban environmental change and identifying pathways towards a more sustainable

future. His research helped lay the groundwork for our understanding of the chemistry of the lower atmosphere, elucidating pathways for the mitigation of urban and regional photochemical smog, and identifying the impact of regional environmental change on global food production. He is a member of the National Academy of Sciences and a fellow of the American Geophysical Union. He has also served on numerous national and international committees and task forces, including being appointed Vice Chair of the Committee on America's Climate Choices, commissioned by Congress to develop a multi-decadal roadmap for America's response to climate change.

Amicus Dr. Russell Dickerson is a professor in the Department of Atmospheric and Oceanic Science at the University of Maryland and Director of the Regional Atmospheric Measurement, Modeling, and Prediction Program (RAMMPP), the research arm of the Maryland Department of the Environment. He earned his A.B. at the University of Chicago, Ph.D. (Chemistry) at the University of Michigan, and did postdoctoral studies at the Max Planck Institute (Air Chemistry Division) in Mainz, Germany. He has more than 30 years experience in atmospheric chemistry and air quality research including measurements and models of pollutant transport on international and interstate scales. He is a member of NASA's Air Quality Applied Science Team and AURA Science Team, as well as a fellow of the American Geophysical Union and the American Association for the Advancement of Science.

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Amica Dr. Tracey Holloway is an Associate Professor in the Nelson Institute for Environmental Studies at the University of Wisconsin-Madison and leads an air quality research program in the Nelson Institute Center for Sustainability and the Global Environment. She is also deputy director of the NASA Air Quality Applied Sciences Team and a 2011 Leopold Fellow, with research supported by NASA, the National Renewable Energy Laboratory, the National Institute of Health, and the U.S. Department of Transportation. She earned her Ph.D. in Atmospheric and Oceanic Sciences from Princeton University. Dr. Holloway's research employs mathematical models of the atmosphere to evaluate how emissions in one area can affect atmospheric chemistry downwind, how alternative energy strategies could improve air quality, and to evaluate connections between climate and chemistry.

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Amicus Dr. Scott Spak is an Assistant Professor holding joint appointments with Urban and Regional Planning, Civil and Environmental Engineering, and the Environmental Policy Program at the Public Policy Center at the University of Iowa. He teaches courses on U.S. and international environmental policy, dynamic systems modeling, and urban growth. Dr. Spak develops and applies numerical models to study the intersection between human activities and environmental change. His research informs

decision-making by identifying tipping points in linked Earth systems, including atmospheric aerosols, chemical pollution, and regional climate, understanding the roles of technology, policy, and societal change in projecting future human impacts on the environment, and developing new ways to embed Earth System modeling in environmental policies and urban planning. He has a Ph.D. in Atmospheric and Oceanic Sciences from the University of Wisconsin.

Amicus Dr. Jason West is an Assistant Professor in the Department of Environmental Sciences and Engineering at the University of North Carolina at Chapel Hill, where he performs interdisciplinary research addressing air pollution and climate change, using models of atmospheric chemistry and transport. Dr. West's research has included computer modeling of the international transport of ozone and particulate matter, and modeling of air pollution formation and transport in Mexico City and the Middle East. He has likewise conducted global scale modeling of the effects of air pollution on global climate change. Dr. West has worked at Princeton University, the Massachusetts Institute of Technology, and at the Environmental Protection Agency under a fellowship from the American Association for the Advancement of Science. He has a Ph.D. and M. S. from Carnegie Mellon University, an M.Phil. from the University of Cambridge, and a B.S. from Duke University.

All *Amici* file this brief solely as individuals and not on behalf of the institutions with which they are affiliated.

SUMMARY OF THE ARGUMENT

In passing the Clean Air Act, Congress recognized that the interstate transport of air pollutants like sulfur dioxide and nitrogen oxides from upwind states has contributed significantly to the inability of downwind states to meet the Act's science-based air quality standards. The Act thus requires the regulation of air pollution emitted by upwind states through the good neighbor provision.

EPA, fulfilling its duties under the Act, promulgated the Cross-State Air Pollution Rule — also known as the Transport Rule — after careful consideration of the realities of this complex phenomenon. The Transport Rule is a reasonable scientific interpretation of the statutory mandate.

In its opinion setting aside the Transport Rule, the lower court imposed three "red lines" or constraints on the EPA's administrative authority which it purported to find in the language of the Clean Air Act itself. However, these constraints do not take into account the complexity of the interstate transport of air pollutants and as a result, it would be difficult, if not impossible, to design a rule that both recognizes the physical realities of air transport and meets these constraints. The lower court erred in doing so, and this Court should reverse its decision.

ARGUMENT

The Clean Air Act, 42 U.S.C. § 7401 *et seq.*, regulates air pollution across the United States. Under the Act, EPA is required to set science-based National Ambient Air Quality Standards (NAAQS)

which limit the amount of specific pollutants in the air to protect public health and the environment. Once EPA has established NAAQS for a pollutant, each state must adopt a State Implementation Plan or SIP designed to insure that NAAQS will be met within state borders.

The Act also places limits on interstate air pollution through the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). This section requires all SIPs to contain provisions that prohibit emissions within state borders that "contribute significantly" to nonattainment or interference with maintenance of the NAAQS by another state. *Id.*

The Cross-State Air Pollution Rule, also known as the Transport Rule, is EPA's latest attempt to implement the good neighbor provision of the Act. Adopted in August 2011, the Transport Rule limits emissions of sulfur dioxide (SO_2) and nitrogen oxides (NO_x) by coal- and natural gas-fired power plants in 27 upwind states that contribute significantly to NAAQS[2] nonattainment and maintenance problems in one or more downwind states.

A coalition of power companies, coal companies, and other industry participants, along with various state and local governments filed suit in the U.S. Court of Appeals for the D.C. Circuit, challenging the Transport Rule. According to the challengers, EPA exceeded its statutory authority to regulate the interstate transport of air pollutants when it adopted

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[2] The relevant NAAQS are the 1997 $PM_{2.5}$ annual NAAQS, the 2006 $PM_{2.5}$ daily NAAQS and the 1997 8-hour ozone NAAQS. C.A. App. 278.

the Transport Rule. The lower court agreed, and in August 2012, vacated the rule.

The lower court held that EPA's administrative authority under the Act is restricted by several "red lines" or constraints. Pet. App. 22a-29a. First, EPA may not force any state to reduce its emissions below EPA's initial threshold for inclusion in the Transport Rule (the Threshold Constraint). *Id.* at 23a. Second, EPA may not force any upwind state to "share the burden of reducing other upwind states' emissions" and must allocate necessary emissions reductions among upwind states in proportion to the size of their contributions to the downwind state's nonattainment or maintenance problems (the Proportionality Constraint). *Id.* at 24a-27a. Third, EPA may not require emissions reductions in upwind states that, when aggregated, go beyond what is necessary for the downwind states to achieve the NAAQS (the Over-control Constraint). *Id.* at 29a.

These constraints have a certain intuitive appeal. They promise no unnecessary emissions reductions and invoke notions of fairness and equity in the allocation of reductions among upwind states. However, the complexity of interstate air transport makes it difficult (if not impossible) to design a rule that meets these constraints. Furthermore, emissions at the source are not directly proportional to pollutant concentrations downwind, which the lower court did not account for, and even if they were directly proportional, air pollution controls do not allow the precise emissions reductions that would be necessary to achieve the perfect allocation the lower court desires. Most pollution controls are blunt

instruments that eliminate pollution in bulk, not pellets capable of cutting out specific amounts.[3] Power plants, also known as electric generating units (EGUs), cannot easily be controlled for specific amounts of SO_2 and NO_x that EPA or the states determine they can emit. Rather, they are fitted with control devices designed to capture SO_2 and NO_x emissions in amounts dictated primarily by the design of the equipment and not subject to much, if any, manipulation when operated[4].

We believe that the lower court's decision fails to recognize these physical realities. The approach EPA used to quantify upwind states' significant contributions to nonattainment and maintenance problems in downwind states and determine upwind states emissions reductions obligations to meet the requirements of the good neighbor provision is scientifically reasonable. The approach recognizes that any control strategy must involve trade-offs due to the complexity of air transport, the various uncertainties involved, and the challenges that arise when dealing with multiple emitting and receiving states.

Hence, the lower court's goal of reducing upwind emissions just enough for downwind states to achieve the NAAQS while allocating the necessary reductions

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[3] Common pollution controls include electrostatic precipitators, baghouses, scrubbers, and selective catalytic reduction.

[4] Operators can, however, manipulate the emissions captured by control devices by not operating them all of the time. EPA specifically addressed this possibility in its rulemaking. C.A. App. 325-26.

in such a way that no upwind state is responsible for more than what the court refers to as its "fair share of the mess in downwind states" is all but unattainable due to the complexities of interstate air transport. The lower court's rigid requirements would not have their intended effect and would only needlessly delay the public health benefits that reduced exposure to air pollution would bring to millions of citizens.

I. INTERSTATE AIR TRANSPORT, AND THE MODELS USED TO SIMULATE IT, ARE COMPLEX.

A. Interstate Air Transport Is A Complex Phenomenon.

Regulating interstate air transport of pollutants is complex because transport, which brings pollutants from distant sources to places that may already be impacted by local sources, occurs on multiple scales. The movements of large high-pressure systems, generally (but not always) from west to east across the United States, cause large-scale transport over many days, their circulation patterns giving rise to more complex transport behavior than their mean movements suggest. Regional phenomena, such as the nocturnal low-level jet over the Atlantic Coastal Plain, cause moderate-scale transport over shorter time frames, often inducing transport in directions at odds with the prevailing wind direction. Land, sea, mountain, and valley breezes cause small-scale, short-term transport in other directions still, selectively affecting local areas. Northeastern States

for Coordinated Air Use Management, *The Nature of the Ozone Air Quality Problem in the Ozone Transport Region: A Conceptual Description* (2006).

Further complicating matters is the fact that the atmospheric processes and variables that influence the formation and air transport of pollutants, including (but not limited to) wind speed and direction, temperature, pressure, relative humidity, the presence of liquid water (i.e., clouds), precipitation, solar energy, and atmospheric turbulence, vary considerably over space and time and can change by the hour, by the day, and by the season, as can the emissions of EGUs and other combustion sources. In addition, the compounds directly emitted by EGUs and subject to removal by control devices, *i.e.*, SO_2 and NO_x, are, in the context of the Transport Rule, just precursors (causal elements) to the pollutants that are actually subject to the NAAQS, *i.e.*, fine particles ($PM_{2.5}$) and ozone. The chemical reactions governing the formation and destruction of these pollutants in the atmosphere are influenced by many of the same varying atmospheric processes and variables that influence air transport.

In short, interstate air transport of pollutants is dependent upon weather phenomena that cause transport on different time and spatial scales. Atmospheric processes and source emissions vary considerably over space and time and can change rapidly. Together, the available precursor emissions and weather conditions initiate complex chemical reactions that produce and destroy pollutants in the atmosphere.

B. The Models Used To Simulate Interstate Air Transport Are Also Complex.

The models developed to simulate transport and identify linkages between upwind sources and downwind receptors take into account our basic understanding of these processes and thus themselves are complex. The accuracy of their predictions depends upon the physical and chemical processes simulated, the mathematical treatment of those processes, and the accuracy of meteorological data, emissions data, and other inputs.

Models are essential tools and provide information that is hard to obtain any other way. Models can identify general patterns of regional transport and can help identify the relative impact of local versus upwind sources. They can also identify upwind states' impacts on downwind states in rough proportion to the size of their emissions reasonably well.

Still, it is important to recognize that models, including those used by EPA to estimate interstate transport, are not perfect. Observations from field experiments add powerful, additional evidence. For example, aircraft observations show that ozone concentrations in air crossing the upwind (western) borders of smaller Eastern states such as Maryland and Delaware often already exceed the NAAQS, demonstrating that the only practical way for certain downwind states to be in attainment is stricter controls on emissions from upwind states. L.C. Brent et al., *Evaluation of the Use of a Commercially Available Cavity Ringdown Absorption Spectrometer*

for Measuring NO_2 in Flight, and Observations over the Mid-Atlantic States, during DISCOVER-AQ, Atmos. Chem., DOI 10.1007/s10874-013-9265-6 (2013). Therefore, model simulations must be evaluated against direct measurements of air pollutants such as ozone and its precursors, especially NO_x. When such comparisons are made for the eastern U.S., regional models generally *underestimate* both the spatial scale of pollution episodes, and the range of transport. J.M. Godowitch, G.A. Pouliot, and S.T. Rao, *Assessing Multi-Year Changes In Modeled And Observed Urban NOx Concentrations From A Dynamic Model Evaluation Perspective*, 44 Atmos. Environ., 44, 2894–2901 (2010).

II. EPA'S APPROACH TO THE QUANTIFICATION OF UPWIND STATES' SIGNIFICANT CONTRIBUTIONS AND THE DETERMINATION OF UPWIND STATES' EMISSIONS REDUCTIONS OBLIGATIONS IS SCIENTIFICALLY REASONABLE.

In designing the Transport Rule, EPA made substantial use of air quality modeling. As the technical support documents demonstrate, EPA's use of modeling was a scientifically appropriate use of this important tool.

EPA first used an air quality modeling platform known as the Comprehensive Air Quality Model with Extensions (CAMx) version 5.3 to determine which states to include in the Transport Rule. CAMx is a photochemical model that simulates the emission, transport, chemical transformation, and removal of

pollutants in the troposphere, where most of these processes take place. It has been employed extensively by local, state, regional, and federal government agencies, academic and research institutions, and private consultants for regulatory assessments and general research throughout the U.S. since 1996. Council for Regulatory Environmental Modeling, *Model Report: Comprehensive Air Quality Modeling with Extensions* (2009), available at http://cfpub.epa.gov/crem/Knowledge_base/crem_report.cfm?deid=75888.[5]

EPA used CAMx modeling for its initial screening analysis, wherein it determined which upwind states contribute at or above a threshold level (1% of the relevant NAAQS) to one or more downwind nonattainment or maintenance receptors. The 1% threshold was used to screen out states with relatively small contributions to pollution in downwind states. It was not used to quantify upwind states' significant contributions to nonattainment and maintenance problems in downwind states.

For its subsequent control analysis, in which it quantified the emissions that it defines as each upwind state's significant contribution to nonattainment or maintenance problems in

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[5] The *Model Report* gives several examples of state government use of CAMx in the "Case Studies" section. *Id.* Additional information is available at the regulatory sites. *See, e.g.*, Texas Commission on Environmental Quality (TCEQ). Houston-Galveston-Brazoria 8-Hour Ozone SIP Modeling (2005/2006 Episodes): CAMx Modeling Domain, available at http://www.tceq.texas.gov/airquality/airmod/data/hgb8h2/hgb8h2_camx_domain.html (showing CAMx modeling domain used by TCEQ in SIP development extending over eastern U.S.).

downwind states, EPA identified each upwind state's emission reductions available at ascending costs per ton, assessed those upwind emission reductions' downwind air quality impacts, identified upwind "cost thresholds" that deliver the most cost-effective emission reductions and downwind air quality improvements, and wrote the emissions reductions available at those cost thresholds into state emissions budgets.[6] *See* C.A. App. 317 (summary of method).

In its technical support documents, EPA explained its inclusion of cost factors in the Transport Rule, offering, among other reasons, the following example. Suppose a downwind state exceeds the NAAQS by 1.2 $\mu g/m^3$. It receives 4.8 $\mu g/m^3$ of the pollutant from four upwind states. For the downwind state to meet the NAAQS, all upwind states would have to reduce their cumulative contribution by 1.2 $\mu g/m^3$. C.A. App. 2311. If the reductions are made in proportion to state contributions to downwind nonattainment, the absolute reductions required would vary from state to state, but the relative reductions would stay the same. In this example, each state would have to reduce its contribution by 25%.

States that had already implemented stringent control programs would have a much harder time achieving the required reductions whereas the states

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[6] The Transport Rule's state emissions budgets represent the quantity of pollutants that may be emitted in each upwind state after it eliminates its significant contribution to nonattainment by, or interference with maintenance in, downwind states. C.A. App. 281.

that had done little to control air pollution would find it easy to achieve the same percentage. C.A. App. 2312. Suppose State A, which does not require much in the way of air pollution controls, contributes 2.4 $\mu g/m^3$ of the 4.8 $\mu g/m^3$. Its power plants would have to reduce their emissions by a relatively large 0.6 $\mu g/m^3$, but the reductions might be accomplished through the use of first-line, low-cost pollution controls, such as switching to lower-sulfur coal. On the other hand, State B, which contributes only 0.4 $\mu g/m^3$ of the 4.8 $\mu g/m^3$ but which already requires its power plants to use lower-sulfur coal, precipitators and baghouses, might have difficulty reducing its contribution by even the relatively small amount of 0.1 $\mu g/m^3$. Since State B already requires higher-level, cost-effective controls, its power plants would likely be subject to considerable expense while achieving little in absolute numeric emissions reductions. C.A. App. 2311-12. States would thus have little incentive to require stringent controls on their power plants on their own, *i.e.*, absent any legal requirement to do so.

For these reasons, we believe that the consideration of cost factors to define "significant contribution" and assign transport-related emissions reductions obligations is reasonable. It is consistent with a scientific understanding of the complexities of air pollution transport, the appropriate use of air quality modeling and its limitations, and available emissions-control technologies and how they work.

III. THE COMPLEXITY OF INTERSTATE TRANSPORT AMONG MULTIPLE STATES MAKES IT DIFFICULT (IF NOT IMPOSSIBLE) TO DESIGN A RULE THAT MEETS THE LOWER COURT'S CONSTRAINTS.

As mentioned above, the lower court imposed three constraints on EPA's authority to regulate interstate air pollution, based on its interpretation of the statutory text. Pet. App. 22a-23a. We believe these constraints have their basis in an overly simplified understanding of how interstate air pollution transport really works.

This understanding can be illustrated by the example of proportionality found in the lower court's opinion. *See* Pet. App. 26a. Suppose, the lower court says, that the NAAQS for a pollutant is 100 units and the nonattainment area in that state contains 150 units of that pollutant, 60 units of which originated in upwind states. *Id.* According to the lower court, EPA cannot lawfully require the upwind states, when their contributions are combined, to reduce the level of the pollutant by more than the 50 units by which the downwind state exceeds the 100-unit NAAQS. *Id.* Therefore, if three upwind states each contribute equally to the downwind state's air quality exceedance, EPA can only require the upwind states to lower the level of the pollutant emitted by no more than 1/3 of the 50-unit, out-of-state contribution, or 16 2/3 units. *Id.*

Downwind nonattainment in this example (and in the lower court's understanding) is caused by contributions from a small number of isolated

upwind states contributing a readily measurable amount of a specified pollutant to one (and only one) nonattainment area in one downwind state. This is not realistic. This example also assumes, incorrectly, that the amount of a pollutant that leaves an EGU's stack in an upwind state is consistently proportional to the ambient concentration of that pollutant in affected downwind states.

The reality, however, is much more complicated. First, most upwind states contribute, in varying degrees, to nonattainment and maintenance problems in many downwind areas. For example, according to EPA's modeling, Kentucky contributes to 12 annual $PM_{2.5}$ nonattainment receptors in six states, four annual $PM_{2.5}$ maintenance receptors in two states, 20 24-hour $PM_{2.5}$ nonattainment receptors in eight states, 21 24-hour $PM_{2.5}$ maintenance receptors in seven states, four 8-hour ozone nonattainment receptors in two states, and six 8-hour ozone maintenance receptors in four states. C.A. App. 2706; 2708, 2710; 2712; 2702; 2704.

Second, many states that are upwind contributors to pollution problems in other states also have NAAQS nonattainment and maintenance problems of their own, i.e., they are both "upwind" and "downwind." For example, according to EPA's modeling, Ohio is an upwind state contributing to six annual $PM_{2.5}$ nonattainment receptors in five states, two annual $PM_{2.5}$ maintenance receptors in one state, 18 24-hour $PM_{2.5}$ nonattainment receptors in seven states, 15 24-hour $PM_{2.5}$ maintenance receptors in six states, four 8-hour ozone nonattainment receptors in two states, and six 8-hour ozone maintenance

receptors in four states. *Id.* at 2707; 2709; 2711; 2713; 2705. Ohio is also a downwind state with six annual $PM_{2.5}$ nonattainment receptors and two annual $PM_{2.5}$ maintenance receptors affected by 28 upwind states each as well as two 24-hour $PM_{2.5}$ nonattainment receptors and six 24-hour $PM_{2.5}$ maintenance receptors affected by 26 to 29 states each. *Id.* at 2706-07; 2708-09; 2710-11; 2712-13.

In short, as EPA notes on page six of its opening brief, "the interstate pollution problem is thus best understood as a dense, spaghetti-like matrix of overlapping upwind/downwind 'linkages' among many states, rather than a neater and more limited set of linkages among just a few." The lower court's overly simplistic view of a small number of upwind states contributing to a single downwind state, and the far more complicated set of overlapping upwind/downwind contribution linkages that EPA identified through its air quality modeling for the Transport Rule, are shown in Figures 1 and 2.[7]

This complexity makes it difficult (if not impossible) to develop a rule that meets the lower court's constraints.

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[7] It is worth noting that even the more complicated set of linkages shown in Figure 2 is a vast simplification relative to the real atmosphere, with linkages that change from day to day and year to year.

Figure 1. Interstate air transport as conceived by the lower court. Paul Miller, *Transport Science and the Law* 9 (2013), *available at* http://acmg.seas.harvard.edu/presentations/aqast/jun2013/day2_am_1/7_AQAST_PMiller_NESCAUM_20130605.pdf.

A. The Threshold Constraint.

In the event an upwind state contributes to downwind nonattainment or maintenance problems in more than one area, as is very often the case, the emissions reductions necessary to address that state's significant contribution to one nonattainment area are likely to result in its contribution to other nonattainment area(s) falling below the 1% threshold used in EPA's initial screening analysis, in violation of the lower court's Threshold Constraint[8]. This is

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[8] The lower court's description of the "Threshold Constraint" is less than clear. Pet. App. 36a-37a. It may have meant that an upwind state's *maximum* contribution to the

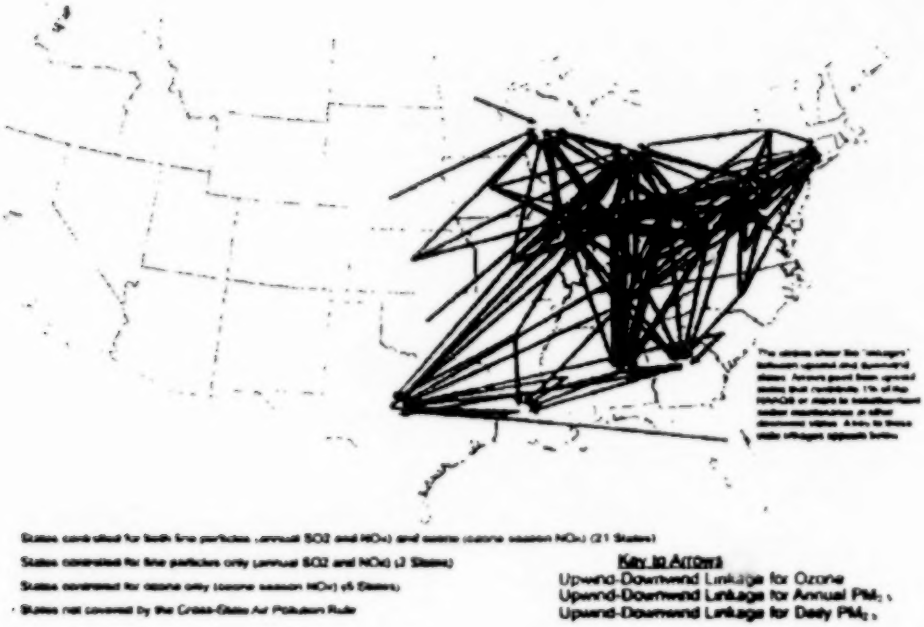

Figure 2. Interstate air transport as modeled by EPA. Paul Miller, *Transport Science and the Law* 8 (2013), available at http://acmg.seas.harvard.edu/presentations/aqast/jun2013/day2_am_1/7_AQAST_PMiller_NESCAUM_20130605.pdf.

particularly true when the amount of pollution the upwind state contributes to one downwind area is significantly more than the amount it contributes to the other(s).

Consider Illinois, which according to EPA's modeling contributes 0.8 ppb — exactly 1% of the

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downwind states cannot be reduced below the threshold or that the upwind state's contribution to *any* downwind state cannot fall below the 1% threshold. If the first interpretation is correct, there is nothing in the administrative record to indicate that the Transport Rule falls short. The second interpretation leads to the scenarios described below.

1997 8-hour ozone NAAQS — to maintenance receptors in Fairfield County, Connecticut and Harris County, Texas, while simultaneously contributing 26.8 ppb — over 33% of the NAAQS — to a maintenance receptor in Allegan County, Michigan. C.A. App. 2704. If EPA required Illinois to reduce its emissions enough to eliminate its significant contribution to Allegan County, Illinois' contributions to Fairfield and Harris Counties would most likely fall below the 1% significance threshold, in violation of the lower court's Threshold Constraint.

Consider also Missouri, which according to EPA's modeling contributes between 0.36 and 0.46 $\mu g/m^3$ — roughly 1% of the 2006 24-hour $PM_{2.5}$ NAAQS — to five nonattainment receptors in Michigan and Pennsylvania, between 0.86 and 0.88 $\mu g/m^3$ — roughly 2% of the NAAQS — to four nonattainment receptors in Indiana and Wisconsin, and 3.73 $\mu g/m^3$ — nearly 11% of the NAAQS — to a nonattainment receptor in Illinois. C.A. App. 2704. If EPA required Missouri to reduce its emissions enough to halve its 2% contribution to Indiana and Wisconsin, its contributions to Michigan and Pennsylvania might fall below the 1% significance threshold, in violation of the lower court's Threshold Constraint, and it would still contribute significantly to Illinois. On the other hand, if EPA required Missouri to eliminate all of its significant contribution to Illinois, Missouri's contributions to Michigan, Pennsylvania, Indiana *and* Wisconsin would most likely fall below the 1% significance threshold.

In instances such as these, EPA might theoretically be able to meet the Threshold

Constraint by imposing tailored emissions reductions on specific EGUs in upwind states, provided that different plants contributed to different nonattainment and maintenance receptors in downwind states. However, just as upwind states typically contribute to downwind nonattainment or maintenance problems in more than one area, individual sources, particularly large, high-emitting EGUs, are likely to contribute to downwind nonattainment or maintenance problems in more than one area too. In that case, even EGU-specific emissions reductions wouldn't allow EPA to design a rule that meets the Threshold Constraint.

B. The Proportionality Constraint.

The lower court's view of interstate air pollution, where a small number of upwind states contribute to a single downwind state as shown in Figure 2, assumes each upwind state's contribution to the downwind state is easy to calculate. However, in reality, many upwind states contribute significantly to nonattainment and maintenance problems in numerous downwind states and contribute in differing proportions to each one. Where that is the case, it is impossible for the upwind state to reduce its emissions in proportion to its contribution to one downwind state without necessarily over- or under-controlling for its contribution to every other downwind state. The reductions required to meet the Proportionality Constraint are different in each instance, and cannot be met simultaneously.

For example, according to EPA's modeling, a nonattainment receptor in Marion County, Indiana

receives contributions from 28 upwind states, with eight of these states exceeding the 1% threshold for the 24-hour $PM_{2.5}$ NAAQS. C.A. App. 2710-11. Similarly, a nonattainment receptor in Allegheny County, Pennsylvania receives contributions from 28 states, seven of which contribute more than 1% of the same NAAQS. *Id.* West Virginia (9%) and Tennessee (11%) each contribute roughly similar amounts to the Marion County receptor while Kentucky contributes significantly more, with 32% of all contributions over the 1% threshold for that receptor. So, in order to meet the Proportionality Constraint for their contributions to Marion County, West Virginia and Tennessee's emissions would have to be reduced by about the same amount while Kentucky's emissions would have to be reduced by approximately three times as much to account for its larger contribution to the Marion County receptor.

However, the Proportionality Constraint simultaneously requires these same states to make a completely different set of emissions reductions for their contributions to the Allegheny County receptor. West Virginia contributes 30% of all contributions over the 1% threshold to the Allegheny County receptor, while Kentucky's contribution is 11%, and Tennessee's only 3%. In this case, the Proportionality Constraint would require West Virginia to reduce its emissions more than twice as much as Kentucky and ten times as much as Tennessee. This trio of states would be subject to emissions reduction in ratios of 3:4:11 and 10:1:4 concurrently. This is simply not possible.

C. The Over-control Constraint.

According to the lower court, EPA may only require the precise level of emissions reductions in upwind states necessary for downwind states to achieve the NAAQS. In the lower court's view, impermissible over-control occurs when upwind emissions reductions cause pollutant levels in downwind nonattainment areas to drop below the NAAQS. However, given the complex and varied web of interstate pollution transfers, compliance with the Threshold and/or Proportionality Constraints is certain to result in non-compliance with the Over-control Constraint.

If an upwind state is required by the Transport Rule to make a large reduction in a pollutant, based on its large contribution to one downwind state's nonattainment of the NAAQS, that same large reduction may reduce the level of that pollutant in another downwind state so that the second downwind state achieves air quality better than the NAAQS. That is, eliminating upwind states' significant contributions to heavily polluted downwind states is likely to cause unavoidable over-control in less polluted states.

In reality, the net effect of EPA's Transport Rule *is under*-control, not over-control. Even after the Transport Rule is fully implemented, not all downwind nonattainment and maintenance problems will be resolved. C.A. App. 316. Furthermore, the NO_x controls EPA's Transport Rule would require during the ozone season are already in place in most states under the Clean Air Interstate Rule (CAIR).

Yet despite these controls, many ozone monitors in the eastern U.S. are still recording concentrations at or above the NAAQS. Table 1 summarizes NO_x emissions reported to the EPA CAIR program in recent years and the number of monitors recording at least one exceedance of the 0.08 part per million (ppm) ozone NAAQS.

Year	NO_x emissions (tons/ozone season)	No. monitors above 0.08 ppm NAAQS
2008	689,000	21
2009	495,000	0
2012	514,000	70

Table 1. Annual ozone season NO_x emissions reported to the CAIR program and corresponding number of ozone air monitors recording a 4th maximum 8-hour ozone average above the NAAQS within states affected by the CAIR program. Data available at EPA, *Air Markets Program Data* (June 19, 2013), http://ampd.epa.gov/ampd; EPA, *Monitor Reports* (Sep. 9, 2013), http://www.epa.gov/airquality/airdata/ad_rep_mon.html.

In sum, the constraints imposed by the lower court's opinion are not based on a realistic scientific understanding of the complexity of interstate air transport. EPA's Transport Rule is a reasonable implementation of the good neighbor provision of the Clean Air Act that does take these realities into account. Therefore, the rule should be allowed to stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the lower court's decision.

Respectfully submitted,

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AMICUS CURIAE BRIEF

Nos. 12-1182 and 12-1183

IN THE

Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*,
Respondents.

AMERICAN LUNG ASSOCIATION, *ET AL.*,
Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *ET AL.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files *amicus* briefs in cases raising issues of concern to the Nation's business community.

This case presents a question of vital importance to the Chamber and its members: whether EPA's Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), exceeds the agency's authority under the Clean Air Act, 42 U.S.C. §§7401 *et seq.* The Act's "good-neighbor" provision requires state implementation plans to address emissions from upwind States that "contribute significantly" to "nonattainment" of air quality standards in downwind States. 42 U.S.C. §7410(a)(2)(D)(i)(I). In the rule under review, however, EPA disregarded the express limits on its authority under that provision, imposing air quality controls to reduce emissions regardless of whether the emissions contribute to nonattainment and regardless of whether attainment could be achieved with less extensive controls. Rather than adhere to its statutory mandate, EPA effectively treated the Act as a

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* made such a contribution. All parties consented to the filing of this brief. Copies of the letters granting consent have been filed with the Clerk.

license to regulate interstate air pollution to whatever extent it deemed to be in the public interest.

That leveraging of the good-neighbor provision into a license for general regulation of interstate emissions is a matter of grave concern to the Chamber and its members. Many of the Chamber's members produce regulated emissions subject to EPA's rule. Those members have a strong interest in ensuring that EPA does not impose burdensome regulations beyond those authorized by the Clean Air Act.

The Chamber has repeatedly participated in other cases addressing the scope of EPA's statutory authority. See, *e.g.*, *Gen. Motors Corp.* v. *United States*, 496 U.S. 530 (1990); *Sierra Club* v. *EPA*, 551 F.3d 1019 (D.C. Cir. 2008), cert. denied, 130 S. Ct. 1735 (2010). The Chamber has both a unique perspective on the question presented and a substantial interest in ensuring that the Act is interpreted consistent with Congress's design.

BACKGROUND

I. THE CLEAN AIR ACT'S GOOD-NEIGHBOR PROVISION

Congress enacted the Clean Air Act "to encourage and assist the development and operation of regional air pollution prevention and control programs," including programs addressing interstate air pollution. 42 U.S.C. §7401. The Act requires EPA to issue national ambient air quality standards ("NAAQS") for emissions that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* §7408(a)(1)(A). EPA identifies geographic areas that are out of compliance with its NAAQS. *Id.* §7407(d)(1)(B). Each State then assumes primary responsibility for creating a state implementation plan, subject to EPA approval, to bring those areas into compliance. *Id.* §7502.

This case concerns the Act's "good-neighbor" provision. Because air pollution can have effects across state lines, the good-neighbor provision addresses emissions from upwind States that have a detrimental effect on the ability of neighboring downwind States to comply with air quality standards. Under that provision, a state implementation plan must

> contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant *in amounts which will*—(I) *contribute significantly to nonattainment in, or interfere with maintenance by*, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2)(D)(i)(I) (emphasis added).

The provision thus authorizes EPA to require States to regulate emissions to the extent the "amounts" emitted will otherwise "contribute significantly" to "nonattainment" of air quality standards in downwind States (or "interfere with maintenance" of standards already met). *If* the amounts emitted will contribute significantly to nonattainment, EPA may proscribe them. But EPA cannot "over-control" by imposing restrictions to regulate emissions that go beyond what is necessary to secure attainment.

II. EPA's Prior Attempts To Regulate Under The Good-Neighbor Provision

A. The 1998 NO_x SIP Call

In 1998, EPA implemented the good-neighbor provision through a rule known as the NO_x SIP Call. See 63 Fed. Reg. 57,356 (Oct. 27, 1998) (final rule); 62 Fed. Reg. 60,318 (Nov. 7, 1997) (proposed rule). That rule required

certain upwind States to revise their implementation plans to reduce emissions of nitrogen oxide (NO_x), a precursor to ozone. The rule required adoption of controls costing up to $2,000/ton by all upwind States that contributed significantly to downwind nonattainment or interfered with the maintenance of downwind attainment. 63 Fed. Reg. at 57,358, 57,377.

In ordering those measures, EPA specifically addressed the issue of over-control. EPA "determined that none of the upwind States affected by [the NO_x SIP Call] are affected by 'overkill,' that is, required reductions that are *more than necessary to ameliorate downwind nonattainment*." 63 Fed. Reg. at 57,379 (emphasis added); see also *id.* at 57,403 ("[T]here is no instance of 'overkill,' so that none of the upwind reductions required under today's action is more than necessary to ameliorate downwind nonattainment.").

In *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000), cert. denied, 121 S. Ct. 1225 (2001), the D.C. Circuit upheld EPA's use of cost considerations in the NO_x SIP Call to determine whether upwind States "contribute significantly" to downwind nonattainment. *Id.* at 679. The court found "no evidence of the requisite 'clear congressional intent to preclude consideration of cost.'" *Ibid.* (quoting *Natural Res. Def. Council, Inc.* v. *EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987)).

B. The 2005 Clean Air Interstate Rule

In 2005, EPA supplemented the NO_x SIP Call with the Clean Air Interstate Rule ("CAIR"). See 70 Fed. Reg. 25,162 (May 12, 2005) (final rule); 69 Fed. Reg. 4,566 (Jan. 30, 2004) (proposed rule). CAIR required certain upwind States to reduce emissions of both NO_x and sulfur dioxide (SO_2). 70 Fed. Reg. at 25,162. NO_x affects attainment of the NAAQS for ozone, while both NO_x and

SO_2 affect attainment of the NAAQS for fine particulate matter ($PM_{2.5}$). *Ibid.*

Once again, EPA was careful to determine that its measures addressed only emissions that would contribute to nonattainment. "[T]he 2015 CAIR controls," it found, "are not more than are necessary to attain the NAAQS * * *." 70 Fed. Reg. at 25,194; see also *id.* at 25,195 ("[T]he amount of upwind reductions is not more than necessary to prevent interference with maintenance of the standards * * *."); *id.* at 25,175 ("[$PM_{2.5}$] regional controls are not more than is necessary for downwind areas to attain.").

In *North Carolina* v. *EPA*, 531 F.3d 896 (D.C. Cir. 2008), the D.C. Circuit invalidated CAIR, holding that EPA had not tailored its cost measures to each upwind State's respective contribution to nonattainment. *Id.* at 907-908. EPA's region-wide approach improperly made "one state's significant contribution depend on another state's cost of eliminating emissions." *Id.* at 919-920. The court remanded for further proceedings, but without vacating the rule. *North Carolina* v. *EPA*, 550 F.3d 1176, 1178 (D.C. Cir. 2008).

III. The Rule Under Review

A. The Transport Rule

In 2011, EPA promulgated the Cross-State Air Pollution Rule, or "Transport Rule," to replace CAIR. See 76 Fed. Reg. 48,208 (Aug. 8, 2011) (final rule); 75 Fed. Reg. 45,210 (Aug. 2, 2010) (proposed rule). That rule used a three-step process to impose emission controls under the good-neighbor provision.

First, EPA projected which downwind States would be in nonattainment absent good-neighbor emission controls in upwind States. See 76 Fed. Reg. at 48,211.

Second, EPA used air quality modeling to "determine which upwind states [were] projected to contribute at or above threshold levels to the air quality problems in those areas." 76 Fed. Reg. at 48,211. Upwind States that contributed more than 1% of the applicable NAAQS were deemed "linked" to that nonattainment and required to adopt emission controls. *Id.* at 48,236. States that fell below that threshold were exempt. *Ibid.*

Third, and most relevant here, EPA determined what emission reduction obligations to impose. EPA developed "cost curves" to assess the reductions that "would be achieved in [an upwind] state if all [sources] * * * in that state used all emission controls and emission reduction measures available at [various] cost threshold[s]." 76 Fed. Reg. at 48,248. EPA then used a model to determine what impact the reductions would have in each downwind area. *Id.* at 48,249.

EPA next identified "significant cost thresholds," which it described as "point[s] along the cost curves where a noticeable change occurred in downwind air quality," for example "because a certain type of emissions control strategy becomes cost-effective." 76 Fed. Reg. at 48,249. Thus, rather than determining the minimum cost threshold at which attainment could be achieved, EPA selected cost thresholds where returns began to diminish rapidly, regardless of whether a lower cost threshold also could have achieved the required reductions. Using those thresholds, EPA chose cost controls of $500/ton for NO_x, $2,300/ton for SO_2 for certain "Group 1" States, and $500/ton for SO_2 for other "Group 2" States. *Id.* at 48,249, 48,251-52.

EPA, however, did not examine whether attainment could be achieved through less burdensome measures. Instead, if it thought a proposed cost threshold was cost-

effective, it imposed that threshold. For example, EPA "examined various cost thresholds for ozone season NO_x and identified a cost threshold with rapidly diminishing returns at $500/ton." 76 Fed. Reg. at 48,256. It accordingly imposed that threshold. *Ibid.* EPA did not consider whether a lower threshold would achieve attainment, either generally or if applied to particular States. *Ibid.* Similarly, EPA determined that a $500/ton threshold for SO_2 in Group 2 States would "resolve the nonattainment and maintenance problems." *Id.* at 48,257. But it nowhere addressed whether some lower threshold, such as $400/ton, would likewise resolve those problems.

Commenters brought that over-control to EPA's attention. They provided evidence that less extensive controls could achieve the same attainment goals. See, *e.g.*, Utility Air Regulatory Group Comments 72 (Oct. 1, 2010) (urging little to no benefit from proposed reductions as compared to existing controls); Southern Company Comments 43 (Oct. 1, 2010) (objecting that there was "little to no downwind benefit" from proposed reductions). EPA's only response was that a lower cost threshold was "inappropriate" because States might "stop operating existing pollution control equipment." 76 Fed. Reg. at 48,257.

B. The Decision Below

The D.C. Circuit overturned the Transport Rule, holding that it exceeded EPA's authority in three independent respects. Pet. App. 31a-41a. First, EPA improperly ignored its 1% insignificance threshold—used at its second step to determine whether an upwind State contributed significantly to nonattainment—in evaluating the impact of its emission controls. Pet. App. 36a. In other words, EPA mandated controls designed to reduce upwind States' contributions without regard to whether

they would be driven below the 1% floor it had already deemed insignificant. *Id.* at 37a-38a.

Second, the court held that EPA's use of uniform cost measures conflicted with the good-neighbor provision's proportionality requirement. Pet. App. 38a. Uniform cost measures, the court ruled, forced some upwind States to eliminate more than their "statutory fair share" of emissions. *Id.* at 39a.

Third, the court ruled that EPA had "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce unnecessary over-control in the downwind States." Pet. App. 39a. The good-neighbor provision, it noted, gives EPA authority only over emissions that contribute to nonattainment. *Ibid.* That provision is "not a free-standing tool for EPA to seek to achieve air quality levels in downwind States that are *well below* the NAAQS." *Id.* at 28a. Rather, EPA must limit "upwind States' obligations to the level of reductions necessary and sufficient to produce attainment in the downwind States." *Ibid.*

The court conceded that "there may be some truly unavoidable over-control in some downwind States that occurs as a byproduct of the necessity of reducing upwind States' emissions," and thus "EPA must have some discretion about how to reasonably avoid such over-control." Pet. App. 28a-29a. But "EPA must avoid using the good neighbor provision in a manner that would result in unnecessary over-control in the downwind States." *Id.* at 29a. "Otherwise, EPA would be exceeding its statutory authority, which is expressly tied to achieving attainment in the downwind States." *Ibid.*

The Transport Rule disregarded that principle. EPA "failed to ensure that the collective obligations of the various upwind States, when aggregated, did not produce

unnecessary over-control in the downwind States." Pet. App. 39a. Because "EPA's statutory authority * * * is limited to attaining the NAAQS in the downwind States," "EPA may not require upwind States to do more than necessary for the downwind States to achieve the NAAQS." *Id.* at 39a-40a. EPA "did not try to take steps to avoid such over control." *Id.* at 40a.

ARGUMENT

By its plain terms, the Clean Air Act's good-neighbor provision allows EPA to require emission controls for upwind States only where—and only to the extent that—the State emits "amounts" of pollutants that will "contribute significantly" to downwind "nonattainment." The statute does not permit EPA to require such controls absent downwind nonattainment. Nor does it allow EPA to curtail amounts of emissions in an upwind State more than necessary to achieve downwind nonattainment.

By design and in effect, the Transport Rule runs afoul of those express textual limitations. EPA did not seek to impose emission limits solely to the extent necessary to avoid downwind nonattainment. Rather, departing from its prior practice, EPA established limits by asking whether particular reductions would be "cost-effective" without regard to whether they were necessary to avoid downwind nonattainment. That approach defies the statutory text. The good-neighbor provision is directed solely at "amounts" of emissions that "contribute significantly" to "nonattainment." It does not license EPA to regulate in whatever manner it deems cost-effective or in the public interest.

Predictably, EPA's methodology produced results that departed from the statutory mandate. EPA required upwind States to adopt additional emission controls even where downwind States had already achieved attainment

of NAAQS. And it required adoption of controls that go far beyond what is necessary to achieve attainment. The court below properly set aside EPA's rule as inconsistent with the careful boundaries Congress imposed in the Act.

I. EPA'S AUTHORITY OVER UPWIND EMISSIONS IS LIMITED TO AMOUNTS THAT WILL CONTRIBUTE TO NONATTAINMENT

The good-neighbor provision is not a general license to regulate emissions in the public interest. Instead, EPA's authority is limited to emissions in "amounts" that will "contribute significantly" to "nonattainment" in downwind States. That restriction is not merely explicit in the statutory text. It is also confirmed by the statute's history, longstanding agency practice, and unchallenged precedent.

A. The Statutory Text Unambiguously Limits EPA's Authority To Emissions In "Amounts" That Will "Contribute Significantly" To Downwind "Nonattainment"

In *Chevron, U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court set out the two-step approach courts must apply when reviewing an agency's implementation of the statute entrusted to it for administration. First, applying ordinary tools of statutory construction, a court must determine "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. Only if "the statute is silent or ambiguous with respect to the specific issue" does the Court proceed to the second question of "whether the agency's answer is based on a permissible

construction of the statute." *Id.* at 843; see also *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1868 (2013).

In applying those principles, courts must be guided by the plain meaning of the statutory text. This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992); see also *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1896 (2013). In this case, the statutory text could not be clearer.

The Clean Air Act's good-neighbor provision requires a state implementation plan to

> contain adequate provisions—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the State from emitting any air pollutant *in amounts which will*—(I) *contribute significantly to nonattainment in, or interfere with maintenance by*, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. §7410(a)(2)(D)(i)(I) (emphasis added). The good-neighbor provision thus requires plans to prohibit only particular "amounts" of emissions that will "contribute significantly" to "nonattainment" of NAAQS in another State (or "interfere with maintenance" of attainment already achieved). EPA may prescribe controls only where—and only to the extent that—the downwind State is not already in compliance or would not already be in compliance absent the particular controls the agency proposes.

Dictionaries confirm that plain meaning. To "attain" something is to "reach, arrive at, gain, [or] accomplish" it. 1 *The Oxford English Dictionary* 760-761 (2d ed. 1991);

see also *Random House Unabridged Dictionary* 133 (2d ed. 1993) ("to reach, achieve, or accomplish"). "Non-attainment" is therefore the condition of *not* reaching or achieving some status. EPA may regulate only if, and only to the extent that, a downwind State has not reached or will not reach the relevant NAAQS.

The statute also permits regulation only to the extent that emissions "contribute significantly" to nonattainment. To "contribute to" something is to "do a part in bringing (it) about; to have a part or share in producing" it. 3 *The Oxford English Dictionary*, *supra*, at 848-849; see also *Random House Unabridged Dictionary*, *supra*, at 442 ("to be an important factor in; help to cause"). Where a downwind State is already in compliance, the upwind State by definition cannot be "contribut[ing] significantly" to nonattainment. Similarly, if particular controls would be sufficient to secure attainment, any *additional* restrictions cannot be said to prohibit emissions in amounts that "contribute significantly" to nonattainment. Attainment would be achieved with or without those additional controls.

Indeed, the good-neighbor provision focuses, not on "emissions" generally, but on emissions in "amounts" that will contribute significantly to nonattainment. 42 U.S.C. §7410(a)(2)(D)(i)(I). If restriction of a particular "amount" of emissions would suffice to achieve attainment, any additional "amounts" cannot be contributing to nonattainment. The Act thus restricts regulation to the minimum extent necessary to ensure that emissions do not "contribute significantly" to nonattainment.[2]

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[2] The Act's separate reference to emissions that "interfere with maintenance" of air quality standards does not alter that analysis. 42 U.S.C. §7410(a)(2)(D)(i)(I). Regardless of whether the question is whether an emission will "contribute significantly" to nonattainment

"Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *City of Arlington*, 133 S. Ct. at 1868. Congress plainly took the former approach here. The good-neighbor provision imposes a narrow and carefully defined mandate. EPA may insist on controls necessary to prevent upwind States from emitting "amounts" that will "contribute significantly" to downwind "nonattainment." It may not impose air pollution controls merely because it deems them cost-effective, desirable, or otherwise consistent with its view of sound policy.

Congress's specific approach here contrasts with other statutes that authorize agencies to promulgate regulations in the "public interest" or under some similarly flexible standard. See, *e.g.*, 15 U.S.C § 78*l*(b)(1) (authorizing the Securities and Exchange Commission to promulgate "rules and regulations * * * as necessary or appropriate in the public interest or for the protection of investors"); 47 U.S.C. § 201(a) (authorizing the Federal Communications Commission to regulate interconnections and rates as "necessary or desirable in the public interest"); 21 U.S.C. § 823(a) (authorizing the Attorney General to reg-

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or "interfere with maintenance" of attainment already achieved, the relevant point is the same: The agency may not prohibit "amounts" of emissions absent some showing that those particular amounts have a causal connection to either actual or threatened "nonattainment." In practice, the agency treats the two inquiries slightly differently because it evaluates contribution to nonattainment based on a downwind site's *average* projected pollution level while evaluating interference with maintenance based on its *maximum* projected pollution level. See 76 Fed. Reg. at 48,227-28. But even under the more aggressive standard applied to interference, EPA ignored its statutory mandate and went far beyond what was necessary to avoid nonattainment. See pp. 21-24, *infra*.

ister controlled substance manufacturers if "consistent with the public interest"); 23 U.S.C. § 109(a)(1) (authorizing the Secretary of Transportation to regulate highway projects "in a manner that is conducive to safety, durability, and economy of maintenance"). Congress did not adopt that approach in the good-neighbor provision. Instead, it limited EPA to imposing controls that are necessary to ensure that emission amounts from upwind States do not "contribute significantly" to "nonattainment" across state lines.

B. The Clean Air Act's History Confirms The Good-Neighbor Provision's Narrow Scope

The history of Congress's legislation on interstate air pollution confirms the good-neighbor provision's limited scope. Congress has consistently acted cautiously, incrementally expanding EPA's authority while articulating precise standards to govern the agency's actions.

Congress first addressed interstate air pollution in 1963. That statute assigned primary responsibility to the States, authorizing them to "negotiate and enter into agreements or compacts" for the "prevention and control of air pollution and the enforcement of their respective laws relating thereto." Pub. L. No. 88-206, § 2(c), 77 Stat. 392, 393 (1963). The federal government was authorized only to undertake research and "encourage cooperative activities by the States and local governments." *Id.* §§ 2(a), 3, 77 Stat. at 393-394.

In 1970, Congress took an incremental step toward more federal oversight, adding the foundations for the current regime. It created the NAAQS and required States to develop implementation plans. See Pub. L. No. 91-604, § 4(a), 84 Stat. 1676, 1679 (1970). Yet it continued to tread lightly, requiring plans to include only "adequate provisions for intergovernmental cooperation." *Id.* § 4(a),

84 Stat. at 1681. That provision was construed to require only "exchange of information," not "binding enforcement agreements." *Natural Res. Def. Council, Inc.* v. *EPA*, 483 F.2d 690, 692 (8th Cir. 1973).

In 1977, Congress enacted the first version of the good-neighbor provision. Under that version, state implementation plans had to include "adequate" provisions "prohibiting any stationary source within the State from emitting any air pollutant in amounts which will * * * prevent attainment or maintenance [of NAAQS] by any other State." Pub. L. No. 95-95, § 108, 91 Stat. 685, 693 (1977). Congress limited the provision's scope by requiring that downwind nonattainment be linked to a specific individual "source" and that the emissions actually "prevent" attainment. *Ibid.*

Finally, in 1990, Congress took another incremental step by enacting the current provision. Congress dispensed with the requirement that nonattainment be linked to a specific source, instead permitting regulation based on state emissions as a whole. 42 U.S.C. § 7410(a)(2)(D)(i)(I). But Congress retained the basic approach of prior law: Primary responsibility for developing implementation plans remained with the States, and EPA could intervene only to curtail "amounts" of emissions that "contribute significantly" to "nonattainment." *Ibid.*

That history confirms the statute's narrow scope. From the outset, Congress has been careful to cabin EPA authority by imposing specific standards governing its regulation of interstate air pollution. While taking incremental steps to extend the agency's authority, Congress has consistently reaffirmed its basic approach of assigning primary responsibility to the States, subject to EPA oversight only in specific, defined respects.

C. EPA's Prior Positions Confirm The Provision's Narrow Scope

The good-neighbor provision's limited scope is confirmed by EPA's longstanding approach to implementing the provision. In sharp contrast to the approach it took here, in the past EPA had consistently recognized its narrow mandate.

For example, in the NO_x SIP Call—EPA's first rule implementing the provision—the agency recognized that downwind nonattainment was a precondition for regulation: "The initial prong under section 110(a)(2)(D) is whether sources 'contribute significantly' to 'nonattainment * * *' with respect to the NAAQS. The initial inquiry for this prong is to identify and determine the geographic scope of 'nonattainment' downwind." 62 Fed. Reg. at 60,324. EPA issued the rule only after specifically finding that "none of the upwind States affected by [the NO_x SIP Call were] affected by 'overkill,' that is, required reductions that are *more than necessary to ameliorate downwind nonattainment*." 63 Fed. Reg. at 57,379 (emphasis added); see also *id.* at 57,403 ("[T]here is no instance of 'overkill,' so that none of the upwind reductions required under today's action is more than necessary to ameliorate downwind nonattainment.").

In defending its rule in the D.C. Circuit, EPA emphasized its efforts to avoid over-control, stressing that it had imposed the minimum burdens necessary to achieve attainment. The agency explained that it had "reviewed the modeling results to assure that no upwind State would be required to implement more controls than necessary to allow attainment downwind." EPA Br. in *Michigan* v. *EPA* at 19, 1999 WL 34841134 (D.C. Cir. filed Aug. 27, 1999). "[I]f there was any imprecision in the amount of required emissions reductions, it was on

the side of undercontrol, not overcontrol." *Id.* at 50. EPA made the same point in opposing certiorari. See Br. in Opp. in No. 00-445 at 11 n.7 (Jan. 2001) ("[I]f anything, EPA erred on the side of under-control rather than over-control.").

EPA adhered to that understanding when it promulgated CAIR to replace the NO_x SIP Call. In that rulemaking, the agency repeatedly emphasized its efforts to limit upwind emission restrictions to those necessary to redress nonattainment. See 70 Fed. Reg. at 25,175 ("[$PM_{2.5}$] regional controls are *not more than is necessary* for downwind areas to attain." (emphasis added)); *id.* at 25,194 ("[T]he 2015 CAIR controls are *not more than are necessary* to attain the NAAQS * * * ." (emphasis added)); *id.* at 25,195 ("[T]he amount of upwind reductions is *not more than necessary* to prevent interference with maintenance of the standards * * * ." (emphasis added)). The good-neighbor provision, EPA observed, "requires upwind States to prohibit the *amount of emissions that contribute significantly* to downwind nonattainment, but does not require the upwind States to prohibit sufficient emissions to assure that the downwind areas attain." *Id.* at 25,177 (emphasis added).

The agency thus consistently recognized that the good-neighbor provision grants it only narrow authority to regulate upwind emissions in defined circumstances.

D. Unchallenged Precedent Confirms The Provision's Narrow Scope

Finally, the good-neighbor provision's plain meaning is confirmed by court of appeals precedent interpreting the statute—precedent EPA has not challenged before and does not challenge now. In decisions reviewing EPA's prior rulemakings, the D.C. Circuit has consistently ruled that EPA lacks authority to "over-control" upwind

emissions. Nowhere does EPA claim that those rulings are incorrect.

First, in *Michigan* v. *EPA*, 213 F.3d 663 (D.C. Cir. 2000), the court relied on the Act's prohibition against over-control to hold that EPA had improperly included Wisconsin in the NO_x SIP Call. Wisconsin, it ruled, did not emit pollution that contributed to "nonattainment in any other state." *Id.* at 681. Although EPA contended that Wisconsin significantly contributed to ozone over Lake Michigan, the agency had not "show[n] on the record that Wisconsin's ozone contribution affects any onshore state nonattainment." *Ibid.* Accordingly, EPA had "acted unlawfully by including Wisconsin in a SIP call limited by statute to states contributing significantly to nonattainment in any other state." *Ibid.*

In *North Carolina* v. *EPA*, 531 F.3d 896 (D.C. Cir. 2008), the court reiterated that EPA lacks authority to over-control upwind emissions. The statute, it explained, "gives EPA no authority to force an upwind state to share the burden of reducing other upwind states' emissions." *Id.* at 921. EPA could regulate each State's own "significant contribution" to downwind nonattainment. *Ibid.* But it could not "require some states to *exceed* the mark." *Ibid.* (emphasis added).

EPA never challenged either of those two rulings. It opposed certiorari in *Michigan*. Br. in Opp. in No. 00-445 (Jan. 2001). And it declined to seek review in *North Carolina*. Nor does the agency dispute those principles now. One can search EPA's brief in vain for any suggestion that the good-neighbor provision authorizes it to regulate amounts of emissions that do not contribute to nonattainment. The statute's plain meaning is as uncontested as it is incontestable.

II. The Transport Rule Contemplates And Produces Precisely The Over-Control The Good-Neighbor Provision Proscribes

The record of EPA's rulemaking shows that the agency did not even attempt to limit its rule to amounts of emissions that contribute significantly to nonattainment. Far from treating the provision as the limited mandate Congress enacted, EPA treated it as license to regulate emissions whenever it thought doing so was cost-effective or otherwise appropriate. And the empirical data—including EPA's own air-quality projections—make clear that the Transport Rule in fact produced precisely the over-control the statute forbids.

A. EPA Did Not Design The Transport Rule To Avoid Over-Control

In adopting the Transport Rule, EPA made no serious attempt to limit itself to its statutory mandate. As EPA describes its own method, the agency used "cost curves" to determine the "emission reductions that would be achieved in a state if all [sources] * * * in that state used all emission controls and emission reduction measures available at that cost threshold." 76 Fed. Reg. at 48,248. EPA then chose cost thresholds it deemed "cost-effective" or "reasonable," without reference to whether they were actually necessary to avoid contributing to nonattainment. *Id.* at 48,257, 48,259.

In its proposed rule, EPA explained that it had selected "[b]reakpoints * * * where a large reduction occurs because a certain type of emissions control becomes cost-effective." 75 Fed. Reg. at 45,271. EPA used "a multi-factor assessment to evaluate whether one or more of the potential breakpoints represent a reasonable cost at which to define significant contribution." *Id.* at 45,274. EPA thus justified its regulatory authority, not on

whether controls were necessary to prevent contributions to nonattainment, but simply on whether it deemed the controls "reasonable."

Likewise, in its final rule, EPA explained that it considered "a significant cost threshold to be a point * * * where large upwind emission reductions become available because a certain type of emissions control strategy becomes cost-effective." 76 Fed. Reg. at 48,249. That determination once again depended, not on whether the controls were necessary to avoid contributing to nonattainment, but on whether EPA deemed them reasonable. For example, EPA declined to "consider cost thresholds below $500/ton for ozone-season NO_x" because it deemed that control level a "reasonable threshold" and "reasonable cost level"—not because attainment was impossible at lower thresholds. *Id.* at 48,256.

EPA's disregard of statutory limits contrasts sharply with its prior rulemakings. In those proceedings, EPA represented that it had carefully limited reductions to avoid "'overkill,' that is, required reductions that are more than necessary to ameliorate downwind nonattainment." 63 Fed. Reg. at 57,379; see also 70 Fed. Reg. at 25,175 (controls were "not more than is necessary for downwind areas to attain"); pp. 16-17, *supra*. Such a representation is wholly absent from the Transport Rule. An agency may not "depart from a prior policy *sub silentio*" without a "reasoned explanation for its action." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The agency's silence here speaks volumes.

In its brief in this Court, EPA all but admits that it did not limit its rule to avoid over-control. The agency explains that it "examined * * * cost and air quality information to identify 'significant cost thresholds,' *i.e.*, 'point[s] where large upwind emission reductions become

available because a certain type of emissions controls strategy becomes cost-effective.'" EPA Br. 11. For example, once EPA determined that "all downwind nonattainment and maintenance problems were solved at a $500/ton threshold," the agency simply "adopted that threshold"—without further analysis of whether contributions to nonattainment could be avoided through lower thresholds. *Ibid.*

EPA insists that its emission limits are "both feasible from the upwind States' perspective and appropriate in terms of the air-quality needs of the downwind areas." EPA Br. 52; see also *id.* at 53 (citing "beneficial and appropriate downwind results"). That proves rather than refutes EPA's disregard of the statute's limited scope. The good-neighbor provision permits regulation only of emissions in "amounts" that would otherwise "contribute significantly" to "nonattainment." It does not permit regulation beyond that point merely because EPA believes such regulation would be "feasible," "beneficial," or "appropriate."

B. The Transport Rule In Fact Results In Over-Control

Given that history, it is no surprise that the Transport Rule in fact produces substantial over-control.

For one thing, the rule imposes costly controls on upwind States even where EPA projected no attainment problems in downwind locations at all. For example, EPA required Texas to adopt emission controls based solely on $PM_{2.5}$ pollution it allegedly caused in Madison, Illinois. 76 Fed. Reg. at 48,242. But in fact EPA's own data showed that air quality in Madison *already satisfied* the applicable standard, and EPA projected further declines in emissions in both Texas and Illinois even with-

out the Transport Rule.[3] Similarly, EPA required both Florida and South Carolina to adopt additional emission controls in 2014 based solely on ozone pollution they allegedly caused at certain sites in Harris, Texas. 76 Fed. Reg. at 48,246. But EPA projected that, by 2014, those sites would have no attainment or maintenance problems *even without any good-neighbor restrictions.*[4]

Those are not isolated examples. EPA required emission reductions based on numerous downwind areas that EPA's own forecasts predicted would be free of attainment problems even absent good-neighbor restrictions—even under the stricter standard EPA applies to "interference with maintenance" claims. See 76 Fed. Reg. at 48,307-08; pp. 12-13 n.2, *supra*. According to other EPA data, moreover, the substantial majority of downwind sites that EPA projected to be in nonattainment or to have difficulty maintaining attainment *were already in attainment* due to existing controls by the time EPA promulgated its rule.[5] Yet the Transport Rule would im-

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[3] See Industry C.A. Br. 39 (citing 76 Fed. Reg. 29,652, 29,654 (May 23, 2011); EPA, *Transport Rule Primary Response to Comments* 564 (June 2011); and EPA, *Emissions Inventory Final Rule Technical Support Document* 104-106 (June 28, 2011)).

[4] See Industry Resp. Br. 19-20 (citing EPA, *Air Quality Modeling Final Rule Technical Support Document*, at B30-B31 (June 2011)).

[5] According to EPA's own data, 14 of the 16 downwind areas for annual $PM_{2.5}$ already satisfied the applicable air quality standard; 38 of the 41 areas for 24-hour $PM_{2.5}$ already satisfied the applicable standard; and 14 of the 16 areas for ozone already satisfied the applicable standard. See Industry C.A. Br. 38-39 (citing EPA, *PM2.5 Site Design Value History Listing, 1999-2001 Through 2008-2010*, tbl.6, cols. J, AC, AW, http://www.epa.gov/airtrends/pdfs/PM25_DesignValues_20082010_FinalRevised.xlsx; EPA, *Monitoring Site Listing for the 2008 8-Hour Ozone NAAQS*, tbl.7, cols. G & L, http://www.epa.gov/airtrends/pdfs/Ozone_DesignValues_20082010_UPDATE.xlsx; and EPA, *Air Quality Modeling Final Rule Techni-*

pose additional reductions nonetheless. See 76 Fed. Reg. 70,091, 70,099 (Nov. 10, 2011) (noting that the Transport Rule "mandates even greater reductions than have already occurred under CAIR"). An upwind State cannot possibly be contributing to nonattainment or interfering with maintenance of attainment where the nonattainment problems do not actually exist.

The Transport Rule also imposes emission reductions that improve downwind air quality far beyond the level necessary to comply with the applicable NAAQS. For example, EPA forecasted annual $PM_{2.5}$ pollution in Fulton, Georgia, of 15.07 $\mu g/m^3$ for 2013 absent good-neighbor restrictions—just barely above the applicable limit of 15 $\mu g/m^3$. 76 Fed. Reg. at 48,233. Nonetheless, EPA required upwind States to reduce emissions so much that Fulton would have annual $PM_{2.5}$ pollution of only 12.99-13.07 $\mu g/m^3$—far *below* the limit of 15 $\mu g/m^3$. See EPA, *Significant Contribution and State Emissions Budgets Final Rule TSD* 35 (July 2011). EPA's rule thus overcorrects Fulton's projected 0.07 $\mu g/m^3$ nonattainment *nearly 30-fold*.

The Transport Rule results in similar overcorrections elsewhere. While the limit for annual $PM_{2.5}$ pollution is 15 $\mu g/m^3$, the Transport Rule forces upwind States to drive down that pollution below 13 $\mu g/m^3$—almost 15% below the limit—in *fully half* the nonattaining downwind areas. See *Significant Contribution and State Emissions Budgets Final Rule TSD*, *supra*, at 35-36. Similarly, while the limit for 24-hour $PM_{2.5}$ pollution is 35 $\mu g/m^3$, the Transport Rule forces upwind States to drive down that pollution below 30 $\mu g/m^3$—again, almost 15%

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cal Support Document 28-33 tbls.IV-1 to IV-6 (June 2011)). See generally EPA, *Progress Report 2011: Environmental and Health Results* 14 (2013).

below the limit—in *more than half* the nonattaining downwind areas. See *ibid.*

The good-neighbor provision does not authorize EPA to regulate *all* emissions from upwind States whenever there is any degree of nonattainment downwind. EPA can regulate only the "amounts" of emissions that "contribute significantly" to "nonattainment." EPA never adequately explained why it was requiring upwind States to reduce downwind pollution to levels so far *below* the applicable NAAQS. It did not examine whether more modest reductions would suffice to achieve and maintain attainment. Nor did it examine whether attainment could be achieved if less burdensome controls were imposed on only particular States or particular subgroups of States.

EPA's sole explanation for not adopting lower or variable cost thresholds was that it wanted to avoid creating incentives for upwind States to "stop operating existing pollution control equipment." 76 Fed. Reg. at 48,257. But if lower cost controls would yield downwind attainment, EPA lacks authority to require more costly measures. EPA may believe that $500/ton is a cost-effective and reasonable threshold. But if attainment is also achieved at $400/ton for a particular State, EPA cannot proscribe additional emissions merely to create incentives to retain existing controls. The good-neighbor provision allows EPA to regulate only to avoid significant contributions to nonattainment, not to pursue whatever policy objectives the agency deems desirable.

C. EPA's Responses Are Unpersuasive

None of EPA's attempted defenses of its over-control is persuasive.

1. *EPA's Waiver Arguments Fail*

Unable to defend its actions on the merits, EPA strenuously attempts to avoid review by asserting—for the first time—that respondents waived the over-control issue before the agency. EPA Br. 36. "Neither the court [below] nor respondents," it urges, "have identified any comment in the Transport Rule record asserting, with anything approaching reasonable specificity, that the EPA's approach" crossed any of the "three 'red lines that cabin EPA's authority.'" *Ibid.* That argument is both wrong and itself waived.

First, while an objection must be raised before the agency with "'reasonable specificity,'" "the word 'reasonable' cannot be read out of the statute in favor of a hair-splitting approach." *Appalachian Power Co.* v. *EPA*, 135 F.3d 791, 817 (D.C. Cir. 1998) (quoting 42 U.S.C. §7607(d)(7)(B)). The Act "does not require that precisely the same argument that was made before the agency be rehearsed again, word for word, on judicial review." *Id.* at 817-818. "[C]ommenters must be given some leeway in developing their argument before this court, so long as the comment to the agency was adequate notification of the general substance of the complaint." *S. Coast Air Quality Mgmt. Dist.* v. *EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006), clarified on denial of reh'g, 489 F.3d 1245 (D.C. Cir. 2007).

That standard is amply met here. Commenters repeatedly objected before EPA that the Transport Rule burdens areas already in or anticipated to achieve attainment.[6] They objected to EPA's failure to consider

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[6] See, *e.g.*, EPA, *Transport Rule Primary Response to Comments* 354 (June 2011) (Midwest Ozone Group comment that "over 80% of the sites predicted by EPA to be in nonattainment of the ozone or $PM_{2.5}$ standards in 2012 are already in attainment" and that "over

existing emission controls in assessing nonattainment.[7] And they objected that the rule imposes more extensive controls than necessary to achieve attainment.[8]

The argument was thus clearly preserved. Contrary to EPA's suggestion, the fact that commenters may not have asserted in so many words that the agency exceeded its *statutory authority* as a result of those defects (EPA Br. 36) is beside the point. The Act clearly defines the agency's authority in terms of "nonattainment." 42 U.S.C. §7410(a)(2)(D)(i)(I). An argument that EPA regulated in the absence of nonattainment, or went be-

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80% of the $PM_{2.5}$ 2012 maintenance sites and 1/3 of the ozone 2012 maintenance sites are no longer maintenance sites as of 2009"); *id.* at 383 (We Energies comment that "EPA has recently released monitoring data that reflects reductions in ozone and $PM_{2.5}$ emission precursors showing that more than 80 percent of monitoring sites projected by the EPA still to be out of attainment in 2012 for ozone or $PM_{2.5}$ were already in attainment as of 2009"); *id.* at 650 (Dayton Power & Light Company commenting that "caps similar to those developed for the CAIR rule are adequate to eliminate inappropriate transport" from Ohio and that "lower [Transport Rule] caps for Ohio are unnecessary to achieve overall attainment").

[7] See, *e.g.*, Southern Company Comments 30 (Oct. 1, 2010) (urging that "EPA's method ignored real emissions reductions from CAIR (still in place and operating) and local SIP-related controls," creating "an overestimate of projected nonattainment/maintenance"); EPA, *Transport Rule Primary Response to Comments* 345 (June 2011) (Consumers Energy comment that rule "deliberately ignores the implementation of CAIR, which remains in effect"); *id.* at 286 (Ameren Services Company comment that "EPA has assumed as part of its regulatory analysis that the CAIR program is not in place" and that this "assumption is in error").

[8] See, *e.g.*, Southern Company Comments 11 (Oct. 1, 2010) (urging that "replacement of CAIR with the Transport Rule will increase our costs" while "results indicate * * * essentially no difference in the desired air quality result"); *id.* at 43 (objecting that "there is little to no downwind benefit from requiring NO_x emission reductions at the $500 per ton level").

yond what was necessary to redress nonattainment, necessarily asserts that the agency strayed beyond its statutory authority. EPA's insistence on "magic words" to preserve a statutory objection is precisely the "hair-splitting approach" the law rejects. *Appalachian Power*, 135 F.3d at 817.

In any event, EPA's waiver argument is itself waived. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Before this Court, EPA vociferously argues that respondents did not preserve their statutory arguments in the agency proceedings. EPA Br. 34-42. But EPA invoked waiver only obliquely in the court of appeals, and only with respect to a *different* issue: whether the agency should have adopted an "air quality-only approach." See EPA C.A. Br. 30. EPA never claimed that respondents waived the over-control issue they assert here. EPA cannot make the argument for the first time now.

2. *Respondents Were Not Required To Pursue Objections In State-Specific Proceedings*

EPA also seeks to avoid review on the theory that respondents must pursue any challenges piecemeal on a State-by-State basis. If the Transport Rule is "too stringent with regard to any particular State," the agency urges, respondents "were free to raise such State-specific concerns in rulemaking comments, and to seek judicial review." EPA Br. 53. That argument ignores the settled standards governing facial challenges and defies EPA's own analysis in this Court.

This Court routinely permits facial challenges to unlawful agency regulations. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). A facial

challenge is a "proper response" when there is a "systemic disparity between the statutory standard and the [regulation]." *Sullivan* v. *Zebley*, 493 U.S. 521, 536 n.18 (1990). That is the case here.

The problem with the Transport Rule is not that the agency properly attempted to determine the minimum emission reductions necessary to avoid significant contributions to nonattainment, but then miscomputed that amount for certain States. Rather, the agency never conducted the required analysis at all—for *any* State. EPA used a cost-curve analysis wholly divorced from the point at which attainment would be achieved. See pp. 6-7, *supra*. It selected its cost thresholds because it concluded that further reductions would not be cost-effective, not because the thresholds represented the point at which emissions would no longer contribute to nonattainment. EPA never found that *any* State's mandated reductions were the minimum necessary.

An agency must engage in "reasoned decisionmaking," considering the relevant factors under the proper statutory standard. *Judulang* v. *Holder*, 132 S. Ct. 476, 483-484 (2011). EPA did not do that here, for *any* State. Because the agency's errors permeate its entire rule, they represent a "systemic disparity" between the statute and the regulation.

EPA's assertion that individual States should have sought relief on a piecemeal basis also defies the central theme of its submission to this Court—that interstate air pollution is a problem involving "hundreds of overlapping linkages among dozens of upwind states and downwind areas" and a "web of interconnecting upwind/downwind linkages." EPA Br. 51. Even if the Transport Rule's controls coincidentally satisfy statutory requirements for certain States, it strains credulity to suggest that the

Rule's many invalid applications could be stricken while leaving the remainder as a coherent, functioning whole. A regulation is severable only if partial invalidation "will not impair the function of the [regulation] as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 294 (1988). That clearly is not the case here.

3. *Residual Nonattainment In Certain Areas Does Not Justify Over-Control In Others*

On the merits, EPA suggests that, even though it never set out to avoid over-control in its rulemaking, it may have stumbled into that result nonetheless. The Transport Rule, it claims, "hardly can be said to have imposed any significant amount of avoidable over-control" because, "in the EPA's final air-quality modeling, several populous locations were projected to continue experiencing nonattainment or maintenance problems despite the emission reductions required." EPA Br. 53. That assertion is neither well-taken nor well-supported.

As an initial matter, EPA cannot invoke that theory in this Court because it never relied on the theory when it promulgated the Transport Rule. "The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943). This Court "will not uphold a discretionary agency decision where the agency has offered a justification in court different from what it provided in its opinion." *Morgan Stanley Capital Grp. Inc.* v. *Pub. Util. Dist. No. 1*, 554 U.S. 527, 544 (2008). Unlike EPA's prior rulemakings in this area, see pp. 16-17, *supra*, the Transport Rule nowhere asserts that EPA avoided over-control or otherwise limited itself to proscribing only those emission amounts that would contribute to actual nonattainment.

EPA cannot supply that omitted analysis for the first time in its brief to this Court.

In any event, EPA's argument fails on the merits. EPA points to a mere "four areas" projected to continue experiencing residual nonattainment for 24-hour $PM_{2.5}$—Chicago, Detroit, Lancaster, and Allegheny. EPA Br. 53 (citing 76 Fed. Reg. at 48,210). But many more areas are being driven far *below* the NAAQS. See pp. 23-24, *supra*. EPA cannot rely on residual nonattainment at a mere handful of sites to justify massive overcorrections at numerous others.

Moreover, EPA has imposed costly emission reductions in numerous States even though it admits that many do not contribute to the residual nonattainment in the "four areas" it cites. For example, Georgia is subject to the Transport Rule for 24-hour $PM_{2.5}$ solely because it contributes to nonattainment in Jefferson, Alabama, an area that EPA predicts will be brought well within air quality limits under its rule. See 76 Fed. Reg. at 48,242-43; *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). EPA never explains how residual nonattainment in four *unrelated* areas justifies excessive controls for Georgia. Other regulated States not linked to the four areas for 24-hour $PM_{2.5}$ include Alabama, Kansas, Minnesota, Nebraska, and Texas. 76 Fed. Reg. at 48,242-43.

Simply put, EPA has never identified any causal connection between the myriad cases of overcorrection and the four areas of residual nonattainment it now cites. Absent such a connection, the residual nonattainment is irrelevant. EPA cannot justify exceeding statutory limits in numerous areas based on nonattainment elsewhere if its overcorrections could be remedied without material effect on that nonattainment. EPA's refusal to accept

that limitation is simply one more manifestation of its refusal to acknowledge its limited statutory mandate: to regulate emissions that "contribute significantly" to downwind nonattainment.

4. *EPA Cannot Avoid Review On The Ground That Complying With Statutory Limitations Is Too Complicated*

Finally, EPA contends that this Court should disregard any over-control because it is too hard to comply with the Act's restrictions. EPA Br. 51. That argument likewise comes too late. As already explained, agency decisions must be judged based on the rationale that appears in the order itself. *Chenery*, 318 U.S. at 87. EPA never invoked an impossibility defense when it promulgated the Transport Rule, so it cannot raise the theory *post hoc* on appeal.

In any event, EPA fails to show that complying with the good-neighbor provision would be impossible. EPA complains that tailoring emission reductions is like trying to stop "on a dime." EPA Br. 51. Where an upwind State contributes to nonattainment in multiple downwind States, it urges, the agency may have to "incidentally bring some [areas] * * * below the level needed for attainment" to ensure attainment in others. *Ibid.* Even if true, that does not justify the rule EPA promulgated.

For example, even though Georgia contributes to 24-hour $PM_{2.5}$ nonattainment or maintenance at only two locations in Jefferson, Alabama, the Transport Rule overcorrects maximum projected pollution levels at those locations to under 32 $\mu g/m^3$, far below the limit of 35 $\mu g/m^3$. See 76 Fed. Reg. at 48,242-43; *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). Other States like Texas and Minnesota contribute to only one or a few downwind sites, yet there are signifi-

cant overcorrections there as well. See 76 Fed. Reg. at 48,242-43; EPA, *Significant Contribution and State Emissions Budgets Final Rule TSD* 36 (July 2011). EPA did not need to stop "on a dime" to avoid glaring defects like those. It missed the mark by hundreds of millions of dollars.

Even where the linkages are more complicated, EPA's argument fails. EPA never even *attempted* to avoid overcorrection. It did not merely "incidentally bring some [areas] * * * below the level needed for attainment" in order to comply with the statute elsewhere. EPA Br. 51. EPA ignored the statutory standard throughout. This is not a case where an agency accidentally overshot despite its best efforts. EPA made no effort to comply with the express limits Congress placed on its authority.

EPA offers no explanation for why it could not limit emission reductions to individual state contributions rather than applying one-size-fits-all cost curves that result in substantial over-control. That the necessary calculations may be complicated is no excuse. Technical challenges are delegated to agencies precisely because of their expertise. And EPA in fact did use different SO_2 cost controls for different States ($2,300/ton for some and $500/ton for others). 76 Fed. Reg. at 48,251-52. The court below thus did not require EPA to do anything it was not already doing: If EPA could use multiple cost measures for SO_2, there is no reason it could not use multiple cost measures for each State or for smaller groups of States. EPA may not be able to achieve absolute perfection. But that does not excuse it from even trying.

Finally, if it were truly impossible to achieve substantial compliance with the statutory limits, EPA's remedy would lie with Congress. An agency cannot unilaterally ignore statutory commands merely because it thinks they

are too hard to comply with. See, *e.g.*, *Bellevue Hosp. Ctr.* v. *Leavitt*, 443 F.3d 163, 180 n.19 (2d Cir. 2006) ("If Congress's timeline presents any problems for the agency, its remedy is to seek relief from the legislative branch."). That an agency may view a particular approach as a "better regime" does not mean it is "the one that Congress established." *MCI Telecomm. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994). "Congress has established a clear line" in requiring nonattainment as a condition for regulation, and EPA "cannot go beyond it." *City of Arlington*, 133 S. Ct. at 1874.

* * * * *

EPA treats the good-neighbor provision as a general license to impose far-reaching "cost-effective" reductions, even where they exceed what is necessary to eliminate contributions to nonattainment. There is nothing wrong with considering cost-effectiveness in carrying out a statutory mandate, and much to commend that approach when the statute permits it. But an agency cannot exercise powers Congress has withheld from it merely because it purports to do so in a "cost-effective" fashion. That is what EPA did here.

Congress did not seek to remedy interstate air pollution at all costs, much less grant EPA unfettered discretion in deciding how to do so. It preserved the primary role of States in developing implementation plans and assigned EPA only a specific and carefully defined role: to ensure that plans restrict "amounts" of upwind emissions that "contribute significantly" to downwind "nonattainment" (or "interfere with maintenance" of attainment already achieved). Because EPA exceeded that limited authority, the Transport Rule must be set aside.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted.

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v.

EME HOMER CITY GENERATION, L.P., ET AL., RESPONDENTS

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL., RESPONDENTS

On Writs of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

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BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case. *Amicus* submits this brief to demonstrate that the text, history, and structure of the Constitution all strongly support Congress's power to enact laws that address genuinely national problems like interstate air pollution and, in turn, bolster the Environmental Protection Agency's authority to deal with this complex problem, including through its recently enacted Transport Rule.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

In the early days of the American Republic, the young nation faced a multitude of difficulties—a woefully underfunded army and navy, uncertain day-to-day funding of the federal government, and disa-

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[1]Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. Pursuant to Supreme Court Rule 37.3, *amicus curiae* states that all parties have consented to the filing of this brief; letters of consent have been filed with the Clerk of the Court.

greements among the States on everything from debt to commerce to meeting treaty obligations. Unfortunately, the nation, then bound by the Articles of Confederation and its ineffectual model of central government, also lacked a national government with sufficient power to address these challenges, which transcended State lines and implicated a national interest the federal government was not yet empowered to protect.

Today, our nation faces new problems that spill across State lines and affect the public interest of the country as a whole, including the scourge of air pollution at the heart of this case. Fortunately, our enduring Constitution conveys ample federal power to address these problems.

When the Framers came to Philadelphia, the failures of the Articles were fresh in their minds. In considering the scope of power necessary to establish a national government capable of meeting the task of governing the United States, the Constitutional Convention delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). The principle of Resolution VI was translated into constitutional provisions—specifically, the powers granted to Congress in Article I—affording the federal government the ability to provide national solutions to national problems.

Interstate air pollution is a quintessential example of the sort of problem that implicates "the general Interests of the Union," in which "the States are separately incompetent," and as to which "the Harmony of the United States may be interrupted by the Exercise of individual legislation." Air pollution does not respect State lines, and emissions from one State may cause harm in another (with little cost to the emitting State). For more than 50 years, the federal government has sought to mitigate interstate air pollution and promote healthy air quality through the Clean Air Act ("CAA"), 42 U.S.C. 7401 *et seq.*, and implementing regulations from the Environmental Protection Agency ("EPA").

The Cross-State Air Pollution Rule at issue here—commonly referred to as the Transport Rule—is the government's most recent attempt to mitigate the spillover effects of air pollution. The EPA promulgated the Transport Rule to address the emission of pollutants in 27 upwind States that significantly contribute to the problem that downwind States have attaining certain air quality standards. As argued persuasively by the Petitioners, the Transport Rule is a reasonable interpretation and application of the CAA.

Nonetheless, the court of appeals threw out the Transport Rule, blatantly interfering with the federal government's attempt to solve the complex interstate problem of air pollution—a challenge that is precisely the sort of national issue the architects of our constitutional system of government intended Congress to solve. Particularly remarkable is the lower court's willingness to, as Judge Rogers explained in her dissent, engage in "a redesign of Congress's vision of

cooperative federalism between the States and the federal government in implementing the CAA," Pet. App. at 65a, based on the panel's own policy preferences and without any basis in the factual record, the controlling statute, or relevant precedent.

Quite contrary to the court of appeals' suggestion that the Transport Rule transgresses the "federalism bar," Pet. App. at 56a, the CAA and the Transport Rule are perfect examples of how the federal government can use its constitutionally granted authority to solve complex interstate problems while respecting the role of the States in our federalist system. Under the CAA, the EPA establishes national air quality standards, including requirements aimed at the spillover effects of air pollution, while leaving the States flexibility to implement their own clean air policies that meet these federal standards. It is only *after* individual States fail to satisfy these requirements—as was the case here—that the CAA imposes a duty on the federal government to intervene and design implementation plans of its own, which is exactly what the EPA did when it created the Transport Rule.

Our Constitution establishes a vibrant system of federalism that gives broad power to the federal government to act in circumstances in which a national approach is necessary or preferable, while reserving a significant role for the States to craft innovative policy solutions reflecting the diversity of America's people, places, and ideas. The CAA and the Transport Rule respect the balance of power the Constitution strikes between the federal government and the States. Unfortunately, the court of appeals failed to respect the limits placed on its role in this

process, overstepping jurisdictional limitations and reworking Congress' statutory scheme and vision of cooperative federalism in the CAA. *Amicus* urges this Court to reverse the decision below and uphold the EPA's Transport Rule as a reasonable effort to carry out its duties under the CAA.

ARGUMENT

I. The Federal Government Has Ample Authority To Regulate Problems That Implicate The National Interest And Cross State Lines, Such As Air Pollution.

The desire to ensure that the United States' national government was furnished with constitutional authority to address truly national problems was perhaps the most important motivation for our Framers to return to the drawing board in the summer of 1787 and craft our enduring Constitution.

Our Constitution was drafted "in Order to form a more perfect Union"—both more perfect than the British tyranny against which the founding generation had revolted and more perfect than the flawed Articles of Confederation under which Americans had lived for a decade since declaring independence. The result was a vibrant federalist system that empowers the federal government to provide national solutions to national problems—including complicated interstate problems such as air pollution—while preserving a significant role for State and local governments to exercise general police power and craft policies "adapted to local conditions and local tastes." Michael W. McConnell, *Federalism: Evaluating the*

Founders' Design, 54 U. CHI. L. REV. 1484, 1493 (1987).

While some have portrayed the Constitution as a document that is primarily about limiting government, the historical context shows that the Founders were just as, if not more, concerned with creating an empowered, effective national government than with setting stark limits on federal power. *E.g.*, THE FEDERALIST NO. 3, at 36 (John Jay) (Clinton Rossiter, ed. 1999) (noting Americans' agreement on "the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes").

By the time our Founders took up the task of drafting the Constitution in 1787, they had lived for nearly a decade under the dysfunctional Articles of Confederation. The Articles, adopted by the Second Continental Congress in 1777 and ratified in 1781, established a confederacy built merely on a "firm league of friendship" among thirteen independent states. ARTICLES OF CONFEDERATION (1781), art. III. Without any serious federal oversight, States often "acted individually when they needed to act collectively." Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010). There was only a single branch of the national government, the Congress, which was made up of State delegations. ARTICLES OF CONFEDERATION, art. V. Under the Articles, Congress had some powers, but was given no means to execute those powers.

This created such an ineffectual central government that, according to George Washington, it nearly cost Americans victory in the Revolutionary War. *See*

18 THE WRITINGS OF GEORGE WASHINGTON 453 (John C. Fitzpatrick, ed. 1931) (Letter to Joseph Jones, May 31, 1780). *See also* WASHINGTON: WRITINGS 393 (John Rhodehamel, ed. 1997) (Circular to State Governments, Oct. 18, 1780). Congress was only able to ask the States to send troops and money to the war cause, but the States were often loathe and late to send such support. *See id.* at 488 (Letter to Alexander Hamilton, March 4, 1783); AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 45-46 (2005) (noting that, in the United States as it existed under the Articles, "the individual states could not be trusted to provide their fair share of American soldiers and the money to pay them").

The inadequacy of the central government of the Articles was not merely a military problem. The government could not ensure compliance with international treaties; after America's 1783 peace treaty with Britain, individual States failed to honor parts of the treaty. *Id.* at 47. Without the power to impose taxes, Congress could not regulate the currency or control inflation effectively, nor could it secure the country's long-term credit. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 619 (1999). The nation could not adequately address civil unrest; indeed, the difficulty Massachusetts had in quelling Shay's Rebellion in 1786 further convinced Washington of the great need for improving upon the Articles of Confederation: "What stronger evidence can be given of the want of energy in our governments than these disorders? If there exists not a power to check them, what security has a man of life, liberty, or property?" 4 THE PAPERS OF GEORGE WASHINGTON: CONFEDERATION SERIES 332 (W.W. Ab-

bot et al., eds. 1992) (Letter to James Madison, Nov. 5, 1786).

As Washington explained to Alexander Hamilton, "unless Congress have powers competent to all *general* purposes, that the distresses we have encountered, the expences we have incurred, and the blood we have spilt in the course of an Eight years war, will avail us nothing." *Id.* at 490 (Letter to Alexander Hamilton, March 4, 1783) (emphasis in original). *See also id.* at 519 (Circular to State Governments, June 8, 1783) ("[I]t is indispensible to the happiness of the individual States, that there should be lodged somewhere, a Supreme Power to regulate and govern the general concerns of the Confederated Republic, without which the Union cannot be of long duration.").

Fortunately, when the Framers assembled in Philadelphia for the Constitutional Convention in 1787, they sought to remedy the failures of the Articles and establish a government with sufficient power to govern the United States. In considering how to grant such power to the national government, the delegates adopted Resolution VI, which declared that Congress should have authority "to legislate in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual legislation." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 131-32 (Max Farrand, ed., rev. ed. 1966). *See also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2615 (2012) (Ginsburg, J., concurring in part and dissenting in part); AMAR, AMERICA'S CONSTITUTION, at 108; Jack M. Balkin,

Commerce, 109 MICH. L. REV. 1, 8-12 (2010). The delegates then passed Resolution VI on to the Committee of Detail, which was responsible for drafting the enumerated powers of Congress in Article I, to transform this general principle into a list of powers enumerated in the Constitution. Balkin, *Commerce*, at 10.

Resolution VI established a structural constitutional principle with "its focus on state competencies and the general interests of the Union." *Id.* Translating this general principle into specific provisions, the Committee of Detail drafted Article I to grant Congress the broad power to, among other things, "regulate Commerce . . . among the several States," U.S. CONST. art I, § 8, cl. 3. These enumerated powers were intended to capture the idea that "whatever object of government extends, in its operation or effects, beyond the bounds of a particular state, should be considered as belonging to the government of the United States." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 424 (Jonathan Elliot ed., 2d ed. 1836) (Statement of James Wilson). *See also* JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 178 (1996) (explaining that Article I was "an effort to identify particular areas of governance where there were 'general interests of the Union,' where the states were 'separately incompetent,' or where state legislation could disrupt the national 'Harmony'"); THE FEDERALIST NO. 80, at 476 (Alexander Hamilton) ("Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control.").

This list of enumerated powers was not an attempt to limit the federal government for its own sake, but rather "was designed so that the new federal government would have power to pass laws on subjects and concerning problems that are federal by nature"—those that individual states could not "unilaterally solve by themselves" and that might, in turn, "hamper economic union in the short run and threaten political and social union in the long run." Balkin, *Commerce*, at 12, 13. This included problems where "activity in one state ha[d] spillover effects in other states." *Id.* at 13. *See also* Cooter & Siegel, *Collective Action Federalism*, at 117.

As Chief Justice John Marshall explained:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.

Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 195 (1824). Today, the problem of air pollution and unhealthy air quality fits within this paradigm. Phrased in the language of Resolution VI, air pollution that crosses State lines is precisely the sort of problem that implicates "the general Interests of the Union," in which "the States are separately incompetent," and as to which "the Harmony of the United States may be in-

terrupted by the Exercise of individual legislation." 2 FARRAND'S RECORDS at 131-32.

II. Congress Has Used Its Constitutionally Granted Authority, Aided By The EPA's Implementing Regulations, To Address The Genuinely National Problem of Interstate Air Pollution.

Air pollution that crosses State lines has long been of concern in the United States. As Justice Oliver Wendell Holmes wrote in 1907, "[i]t is a fair and reasonable demand on the part of a sovereign" in our federal system "that the air over its territory should not be polluted on a great scale . . . by the act of persons beyond its control" in a neighboring State. *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 238 (1907). Then, as now, as the Federal Petitioners explain, "[t]he fundamental problem is that the emitting, or upwind, State secures all the benefits of the economic activity causing the pollution without having to absorb all the costs." Br. of Fed. Ptrs. at 2.

Air pollution is a truly national problem. To begin with, it inevitably crosses State borders, with decisions made in one State often affecting the air quality in others. For instance, consider a State's policy to cluster its power plants near its border. Such a policy may protect the welfare of that State's own citizens, but it may also result in the State's export of air pollution from its power plants to its downwind neighbors. Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. PA. L. REV. 2341, 2350 (1996). Or, consider a State law requiring taller smoke stacks. Again, this policy may protect nearby citizens by sending polluted air

higher into the atmosphere, but it may also increase that pollution's impact further downwind. *Id.* In each case, these policy choices are completely rational. They protect a State's own citizens and send its air pollution elsewhere. At the same time, these decisions also seriously damage the environment in downwind States and, in turn, the health of their citizens. This is federalism run amok, and it demands a national solution.

Without federal intervention, upwind States certainly have an incentive to reduce pollution within their own jurisdiction. At the same time, they have little incentive to protect their downwind neighbors. Even worse, they may actually have an incentive to pollute them, thereby "obtain[ing] the labor and fiscal benefits of the economic activity that generates the pollution" without "suffer[ing] the full costs of the activity." Revesz, *Interstate*, at 2343. Either way, downwind States are helpless before the policy decisions of their upwind neighbors, and often saddled with a degraded environment and less healthy citizens—all through no fault of their own. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 3389 (1989) ("Aggressive controls in downwind areas will do little to improve air quality if the quality of air entering the region is poor.").

This is precisely the sort of problem that the delegates to the Constitutional Convention had in mind when approving Resolution VI, that the Committee of Detail had in mind when translating that general principle into Article I's enumerated powers, and that Chief Justice Marshall had in mind when outlining the reach of federal power in *Gibbons*—a problem that "involve[s] activity in one state that has spillo-

ver effects in other states." Balkin, *Commerce*, at 23. *See also* Neil S. Siegel, *Collective Action Federalism and Its Discontents*, 91 TEX. L. REV. 1937, 1958 (2013) (using interstate pollution as an example of the type of spillover effect that our federal government was designed to address).

Beginning in 1970 with major amendments to the Clean Air Act, Congress set the reasonable goal of ensuring that upwind states were held accountable for the pollution that they exported to their downwind neighbors. Since then, Congress has amended the CAA multiple times to both strengthen these interstate responsibilities and increase the federal government's role in policing interstate disputes.

Congress first pursued a national interstate air pollution policy with the 1970 amendments to the CAA. This initial policy gave States great latitude to coordinate with one another to reduce the spillover effects of air pollution—in turn, carving out a very limited role for the federal government. The original provision required the States to address interstate air pollution through "intergovernmental cooperation," 42 U.S.C. § 1857c-5(a)(2)(E) (1970), with the EPA issuing a regulation simply calling for "an exchange of information among States on factors which may significantly affect air quality in any State," 40 C.F.R. § 51.21(c). Neither the statute itself nor the EPA's implementing regulations included any concrete enforcement measures that might hold upwind States accountable for any harm done to their downwind neighbors.

Before long, Congress concluded that stronger medicine was needed. Prior to enacting major revisions to the CAA in 1977, a House Report

acknowledged that interstate air pollution had "long been a source of concern." H.R. Rep. No. 294, 95th Cong., 1st Sess. 330 (1977). Nevertheless, it conceded that the 1970 amendments were "an inadequate answer to the problem," adding that a mere "information exchange" was "simply insufficient" and that "a *Federal* mechanism for resolving disputes" was required. *Id.* (emphasis added). Similarly, a Senate Report expressed concern that, without "interstate abatement procedures" or "interstate enforcement actions," the 1970 law "result[ed] in serious inequities among the several States" and put some States "at a distinct economic and competitive disadvantage." S. Rep. No. 127, 95th Cong., 1st Sess. 41-42 (1977).

Tracking these concerns, Congress increased federal oversight of interstate air pollution in its 1977 amendments to the CAA. Rather than relying on mere "cooperation" between the States, Congress amended the Act to require upwind States to curb emissions from "any stationary source" that would "*prevent* attainment or maintenance" of federal air pollution standards in downwind States. 42 U.S.C. § 7410(a)(2)(E) (1980) (emphasis added). In amending the CAA in this manner, Congress acknowledged that the previous law had failed because it depended too much on voluntary actions by upwind States that really had no "incentive and need to act." H.R. Rep. No. 294, 95th Cong., 1st Sess. 330 (1977). The new provisions were "intended to establish an effective mechanism for prevention, control, and abatement of interstate air pollution," *id.*—one that would "equalize the positions of the States with respect to interstate air pollution by making a source at least as responsible for polluting another State as it would be

for polluting its own State," S. Rep. No. 127, 95th Cong., 1st Sess. 16 (1977).

By the late 1980s, Congress once again concluded that the current law was too weak,[2] and, in 1990, Congress once again strengthened the federal government's hand. After struggling for years to prove that upwind States had "*prevent[ed]*" them from meeting federal air pollution standards[3]—as required by the 1977 amendments—downwind States finally received even stronger protection in the 1990 amendments. The result was the "good neighbor" provision at issue in this case, a provision that was designed to be more flexible than its predecessor and, in turn, more helpful to downwind States. In relevant part, Congress changed the 1977 law's "prevent attainment or maintenance" prong to a new provision requiring upwind States to "prohibit[] any source or other type of emissions activity . . . from emitting any air pollutant in amounts that will . . . contribute significantly" to nonattainment or maintenance in downwind States—whether or not those emissions could be shown, on their own, to "*prevent*" attainment or maintenance of federal air pollution standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I).

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[2] S. Rep. No. 228, 101st. Cong. 1st Sess. 48-49 (1989) (explaining that "additional efforts must be made" to address the "transport problem").

[3] *See, e.g.*, *State of New York v. EPA*, 852 F.2d 574 (D.C. Cir. 1988); *Air Pollution Control Dist. of Jefferson County v. EPA*, 739 F.2d 1071 (6th Cir. 1984); *State of New York v. EPA*, 716 F.2d 440 (7th Cir. 1983); *State of Connecticut v. EPA*, 696 F.2d 147 (2d Cir. 1982).

From there, the EPA went to work developing regulations to implement this new "good neighbor" provision. In 1998, it established a cap-and-trade program for nitrogen oxide emissions, which, in turn, was largely upheld by the D.C. Circuit in *Michigan v. EPA*, 213 F.3d 663 (2000).

In 2005, the EPA then issued its Clean Air Interstate Rule (CAIR), which attempted to apply its approach to nitrogen oxide to regulations covering fine particulate matter and ozone. 70 Fed. Reg. 25,162 (May 12, 2005). The D.C. Circuit struck down this rule, concluding that it did not go far enough to protect the interests of downwind States like North Carolina. *North Carolina v. EPA*, 531 F.3d 896, 901 (D.C. Cir. 2008) ("*North Carolina I*"). While the court first vacated the rule in its entirety, it later modified its ruling to allow for the EPA to continue to administer CAIR until it could replace it with other (stronger) regulations, *North Carolina v. EPA*, 550 F.3d 1176 (D.C. Cir. 2008) ("*North Carolina II*"). However, the EPA would first have to "redo its analysis from the ground up" as "expeditious[ly] as practicable," *North Carolina I*, 896 F.3d at 929, 930. *See also North Carolina II*, 550 F.3d at 1178 ("[W]e remind the Petitioners that they may bring a mandamus petition to this court in the event that EPA fails to modify CAIR in a manner consistent with [*North Carolina I*].").

Finally, in response to the *North Carolina* decisions, the EPA issued its Transport Rule, which is at issue in this case. This Rule addresses the emissions of 27 upwind States that significantly contribute to the problems downwind States have attaining or maintaining governing air quality standards. None

of these upwind States satisfied their "good neighbor" obligations prior to the EPA's challenged actions. For each State subject to the Transport Rule, the agency had previously conducted an administrative proceeding in which it either (1) made a finding that the State failed to submit a plan addressing the good neighbor requirement or (2) disapproved the State's plan as inadequate. Br. of Fed. Ptrs. at 9. In the Transport Rule, the EPA promulgated federal plans for those states, as required under the CAA. *See generally* Br. of Fed. Ptrs. at 10-13 (describing the EPA's analysis in detail).

The CAA and the EPA's implementing Transport Rule are excellent examples of the type of cooperative federalism envisioned by our Founders. While the EPA establishes national air pollution standards in the first instance, the statutory scheme provides States with flexibility to implement their own clean air policies to meet these federal standards. 42 U.S.C. §§ 7408, 7409. It is only *after* individual States fail to establish adequate air policy programs—as was the case here—that the CAA requires the federal government to step in with implementation plans of its own. 42 U.S.C. § 7410(c)(1).

As discussed above, the CAA, through its "good neighbor" provision, requires each State to craft an implementation plan that addresses the spillover effects of air pollution. Indeed, each upwind State must submit a plan that regulates pollutants that "contribute significantly" to its downwind neighbors' difficulties in complying with federal air pollution standards. 42 U.S.C. § 7410(a)(2)(D)(i)(I). In turn, the CAA provides the EPA with great discretion to define the related policy details through regulations

like the Transport Rule. And when States fail to fulfill their "good neighbor" responsibilities, the EPA has the power to hold them accountable—as it did in this case.

III. In Rejecting The Transport Rule, The Court Of Appeals Undermined The Federal Government's Ability To Address Interstate Air Pollution, And Engaged In An Unauthorized Redesign Of The Clean Air Act's Vision Of Cooperative Federalism.

As Judge Rogers explained in her dissent, the majority in the court of appeals did "several remarkable things" when it vacated the Transport Rule. Pet. App. at 115a. It ignored congressional limitations on the courts' jurisdiction. It ignored precedent enforcing those jurisdictional limitations. It ignored requirements of administrative exhaustion. It deemed the EPA's clearly reasonable interpretation of the Clean Air Act—an "interpretation" Judge Rogers characterizes as "*reading the actual text of the statute*," Pet. App. at 85a (emphasis in original)—absurd. And, in the process, the majority below rewrote the plain text of a federal statute and "recalibrate[d] Congress's statutory scheme and vision of cooperative federalism in the CAA." Pet. App. at 115a.

Just last Term, this Court reaffirmed its commitment to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). As the Court explained then, "*Chevron* is rooted in a background presumption of congressional intent": "Congress knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge agency discretion." *City of Arlington v. FEC*,

133 S. Ct. 1863, 1868 (2013). The court below deviated from this clearly established principle, "transferring any number of interpretative decisions—archetypal *Chevron* questions, about how best to construe an ambiguous term in light of competing policy interests—from [an] agenc[y] that administer[s] the statute[] to [a] federal court[]" and, in turn, "'substituting [the lower court's] own interstitial lawmaking' for that of an agency." *Id.* at 1873. (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). While the Federal Petitioners' brief fully addresses the lower court's substantive and procedural errors, we offer one illustrative example below.

In invalidating the Transport Rule, the lower court concluded, in part, that the EPA erred in issuing a federal implementation plan for noncomplying States, relying on "contextual and structural factors" to support its conclusion, Pet. App. at 54a—over and above the plain text of the CAA. As per the CAA itself, within three years of the EPA issuing new federal air pollution standards, each State "shall" submit a new implementation plan—one that satisfies its "good neighbor" obligations, among other requirements. 42 U.S.C. § 7410(a)(2). The EPA "shall" then "promulgate [a federal plan] at any time within 2 years" after it either "finds that a State has failed to make a required submission" or it "disapproves" of a given State's plan. 42 U.S.C. § 7410(c)(1)(A) & (B).

The Transport Rule covered federal standards first put in place in 1997 (for ozone) and 2006 (for fine particulate matter). 76 Fed. Reg. 48219 (Aug. 8, 2011). Therefore, under the plain text of the CAA, State plans were due three years later—in 2000 and 2009, respectively. In turn, those plans were required

to include provisions satisfying each State's good neighbor obligations. In 2010 and 2011, the EPA concluded that many States had failed to satisfy these requirements. 75 Fed. Reg. 32673 (June 9, 2010). Furthermore, the EPA explained that this "create[d] a 2-year deadline" for each noncomplying State to implement a valid plan. 75 Fed. Reg. 32674. Only after these States failed to comply with this deadline did the EPA issue its own plan, as required by the plain text of the CAA—the lower court's "structural and contextual" factors notwithstanding.

The lower court's failure to recognize that the EPA did, in fact, give the States the opportunity to meet their obligations under the CAA before the agency promulgated federal implementation plans for those States, may account for its conclusion that the Transport Rule transgresses the "federalism bar," Pet. App. at 56a. But it certainly should not be accepted by this Court, when it is clear as day that the EPA's implementation of the CAA's system of cooperative federalism was in line with the statute. In reality, the CAA and the Transport Rule are perfect examples of how the federal government can use its constitutionally granted authority to solve complex interstate problems while respecting the role of the States in our federalist system.

* * *

Our Constitution establishes a federal government that is strong enough to act when the national interest requires a national solution, while reserving a crucial role for the States as our "laboratories of democracy." Congress has the power to address the spillover effects of interstate air pollution, and the EPA has the clear authority under the CAA

to implement a regulation like the Transport Rule to carry out its statutory duty. Far from offending our Constitution's careful balance of federal-state power, the CAA—and the EPA's attempt to implement it through the Transport Rule—reflect our system of vibrant federalism and allow the federal and State governments to better protect their citizens and resources.

CONCLUSION

Amicus supports the steps toward regulating interstate air pollution undertaken in the CAA and believes that the EPA's Transport Rule is valid. *Amicus* respectfully urges this Court to uphold the EPA's Transport Rule and reverse the lower court's contrary holding.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR *AMICI CURIAE* BENJAMIN F. HOBBS, SHMUEL S. OREN, JAMES SWEENEY, AND FRANK WOLAK IN SUPPORT OF PETITIONERS

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The Transport Rule at issue in this case primarily targets the electric generation sector because fossil fuel-fired power plants account for two-thirds of the nation's sulfur dioxide emissions and nearly a quarter of the nitrogen oxide emissions.[2] In the majority opinion below, the court appears to fundamentally misunderstand the structure, operation, and economics of the modern electric generating industry. Today's electric power sector is regionally interconnected and highly dynamic – and becoming more so every day. To be environmentally effective and economically efficient, any interstate air pollution rule must account for these essential attributes of the nation's electric grid and the wholesale electricity markets in which generators and utilities participate. Otherwise, tighter controls on one generating facility, or on one state, will merely shift production to another facility or another state. The rigid state-by-state approach imposed by the court of appeals ignores this reality, making it highly unlikely that the Environmental

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[1] Pursuant to Rule 37.6, counsel for *Amici* state that no counsel for a party authored this brief in whole or in part, and that no person other than *Amici* and its counsel made a monetary contribution to the preparation or submission of this brief. All Petitioners and Respondents have filed letters of consent with the Clerk of the Court.

[2] U.S. Environmental Protection Agency, Clean Energy Website, http://www.epa.gov/cleanenergy/energy-and-you/affect/air-emissions.html.

Protection Agency ("EPA") can achieve the congressional objectives of the Clean Air Act's "Good Neighbor" provision, 42 U.S.C. § 7410(a)(2)(D), and at the same time virtually certain that it will needlessly impose much higher costs on the broader economy by its attempt.

Amici curiae are electrical engineers, economists, and physicists specializing in the study of electricity, the operation of electric power systems, and the design of wholesale electricity markets. They have an abiding professional interest in the proper regulation of the ever more important electric energy industry.[3]

Amicus curiae Benjamin F. Hobbs is the Theodore M. and Kay W. Schad Professor in Environmental Management in the Department of Geography and Environmental Engineering at Johns Hopkins University. He holds a joint appointment in the Department of Applied Mathematics and Statistics, and directs the Johns Hopkins University Environment, Energy, Sustainability and Health Institute. Professor Hobbs serves as the chair of the California Independent System Operator Market Surveillance Committee and as a consultant to the Pennsylvania-New Jersey-Maryland Independent System Operator, where he developed the methodology it uses to evaluate the capacity market demand curve. From 1995

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[3] *Amici* appear here in their individual capacities as scholars, scientists and engineers and not as representatives of the institutions with which they are affiliated.

until 2002, he was also a consultant to the Federal Energy Regulatory Commission's Office of the Economic Advisor. His academic research focuses on stochastic electric power planning models, multiobjective and risk analysis, mathematical programming models of imperfect energy markets, and environmental and energy systems analysis and economics. He holds a Ph.D. in Civil and Environmental Engineering from Cornell University and is a Fellow at the Institute of Electrical and Electronics Engineers and the Institute of Operations Research and Management Science.

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Fellow at the Stanford Institute for Economic Policy Research, the Hoover Institution on War, Revolution and Peace, the Freeman Spogli Institute for International Studies, and the Precourt Institute for Energy. His research includes depletable and renewable resource use, electricity market analysis, environmental economics, global climate change policy, gasoline market dynamics, energy demand, energy price dynamics, and housing market dynamics. He was a founding member of the International Association for Energy Economics and is a Senior Fellow at the U.S. Association for Energy Economics and a member of the California Council on Science and Technology. Professor Sweeney has been or is a member of numerous committees of the National Research Council and is a lifetime National Associate of the National Academies. He holds a Ph.D. from Stanford University in Engineering and Economic Systems.

Amicus curiae Frank Wolak is the Holbrook Working Professor of Commodity Price Studies in the Department of Economics at Stanford University. He currently directs the Program on Energy and Sustainable Development in the Freeman-Spogli Institute for International Studies and is a Senior Fellow at the Stanford Institute for Economic Policy Research. Professor Wolak's fields of specialization are industrial organization and econometric theory. His recent work studies methods for introducing competition into infrastructure industries – telecommunications, electricity, water delivery and postal

delivery services – and on assessing the impacts of these competition policies on consumer and producer welfare. From January 1998 to March 2011, he was the Chair of the Market Surveillance Committee of the California Independent System Operator. Professor Wolak is a visiting scholar at University of California Energy Institute and a Research Associate at the National Bureau of Economic Research. He is also a member of the Emissions Market Advisory Committee for California's Market for Greenhouse Gas Emissions allowances. This committee advises the California Air Resources Board on the design and monitoring of the state's cap-and-trade market for greenhouse gas emissions allowances. He holds a Ph.D. in Economics from Harvard University.

SUMMARY OF ARGUMENT

American dependence upon electric energy has nearly doubled since a Good Neighbor provision, structurally similar to the current one, was added to the Clean Air Act in 1977.[4] The use of the electricity grid as a conveyance of energy from where it is produced to where it can be put to productive use lies at the heart of the U.S. economy. Electricity's share of U.S primary energy was 41 percent in the year 2011.[5]

[4] Energy Information Administration, Annual Energy Review 2011, 221 (2012), *available at* http://www.eia.gov/totalenergy/data/annual/index.cfm.

[5] *Compare id.* at 219, *with id.* at 3.

The modern integrated system of infrastructure, regulation, and markets that conveys electric energy from power plants to consumers is immensely complex, dynamic, and regional.

Most electricity is derived from the combustion at large central station power plants of fossil fuels, including coal, natural gas, and to a lesser degree, oil.[6] An unfortunate byproduct of the fossil fuel combustion process is the substantial emission of air pollutants. A central objective of the EPA and its state partners in implementing the Clean Air Act has been to reduce the contribution of power plant and other combustion to air pollution and its associated public health impacts.

More than 30 years ago, Congress understood that fully resolving the air pollution problem caused by electric power plants would require taking account of the interstate nature of the harm. The tall smokestacks that are such a familiar sight at power plants were initially constructed to reduce local air pollution impacts. They were largely successful in doing so, but had the unintended consequence of spreading pollutants and consequent pollution impacts into downwind air sheds, often in neighboring states. Congress enacted and later revised the Good Neighbor provision of the Clean Air Act to address these cross-border effects.

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[6] *Id.* at 225.

The court of appeals, in interpreting the Good Neighbor provision, imposes several constraints that limit EPA's flexibility in designing a regional response to the interstate air pollution problem. Underlying this interpretation are assumptions that power plant operations are static and controlled at the state level. Unfortunately, those assumptions fail to appreciate the dramatic developments that have occurred over the past 40 years in the physical and governance structure of the U.S. electric power system.

Today, dynamic, regional, wholesale electric power markets operate via a highly interconnected transmission network that extends seamlessly across state boundaries. Because regional competition between power plants determines which plants operate, and the imposition of pollution controls changes individual power plant operating costs, the rigid state-by-state approach dictated by the court of appeals is destined to create numerous unintended consequences that may well undermine the overall pollution control effort.

Both before and since the last modification of the Good Neighbor provision in 1990, Congress has repeatedly enacted legislation aimed at empowering the Federal Energy Regulatory Commission ("FERC") to foster regional, competitive, wholesale markets for electric energy. Congress must have intended any solution to the regional air pollution problem to take account of the physical, regulatory, and economic structure of the electric power system that is its primary cause. As scholars specializing in the design

of the U.S. electric power system, *Amici* respectfully submit this brief to aid the Court in understanding the structure of the modern electricity system and the constraints it places on resolving regional air pollution problems in the United States.

Below, we describe these physical, regulatory, and economic developments in sufficient detail to illustrate the misunderstandings upon which the court of appeals predicated its decision. Then we explain how the interpretation of the Good Neighbor provision articulated by the lower court, when applied to an accurate view of the U.S. electricity system, would most likely prevent EPA from eliminating interstate air pollution harms and would almost certainly result in significant waste of economic resources with no attendant environmental benefits. These additional costs will be imposed not just on electricity generators, but also on the firms and households that consume electricity in the broader U.S. economy.

ARGUMENT

I. The Unique Attributes of Electricity Have Slowly and Inexorably Shaped the Regional Infrastructure and Wholesale Markets that Exist Today.

A. The Fundamental Properties of Electricity Make It Different in Kind from Direct Energy Sources.

Electricity is different from other kinds of energy. To turn on a light, we don't need the source of the energy to be located in the same place. Electricity is the means of conveying energy rather than a source of it; it provides an efficient way to separate the harnessing of energy from its use. This ability to separate the point of generation from the point of end use provides the basis for our complex modern economy as well as the need for the electrical transmission system. It also profoundly affects how energy markets function today.

Thermal power plants are the primary way we convert stored energy into electricity. They consume fossil or nuclear fuel to boil water and use the resulting steam to turn a turbine generator.[7] The spinning generator induces an electrical current in a wire that is then propagated away from the generating plant through transmission lines. In an alternating current

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[7] Other energy sources operate on the same principle. Blowing wind turns the turbine on a windmill and falling water spins the turbine at a hydroelectric plant.

system like the one used in the United States, the direction of the electromagnetic wave reverses 120 times per second. Thus, the electrons do not flow from the power plant to the end user, as commonly believed. Rather, they oscillate more or less in place inside transmission wires, causing a wave of energy – or electric current – to flow through the wire, much like energy is transmitted when one billiard ball strikes another, when sound travels through air, or when a wave crosses the ocean.

The physics of electricity generation make it possible to move energy long distances from power plants to end users, but also pose two important challenges for the operators of electric grids. First, unlike water or fossil fuel, electricity cannot be stored economically for most uses with current technologies. Thus, the generation of electricity at power plants must be continuously balanced against the consumption of electricity drawn out of the system by end users, known as "load." In effect, "[e]lectricity is the ultimate 'just in time' manufacturing process, where supply must be produced to meet demand in real time."[8]

Second, electricity does not necessarily flow from a generator at Point A to a consumer at Point B.

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[8] Paul Joskow, *Creating a Smarter U.S. Electricity Grid*, 26 J. Econ. Perspectives 29, 33 (Winter 2012), *available at* http://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.26.1.29.

Under basic physical laws, electricity distributes itself along the path of least resistance. This means that on an interconnected transmission network or grid, when electricity is consumed at one point in the system (by turning on an electric appliance, for example), power rushes in from surrounding points to reestablish equilibrium across the system.

These unique properties of electricity require careful and constant balancing of the energy load to ensure reliability. When demand increases in one area, the resulting imbalance across the system can cause cascading network failures leading to blackouts. Because there are currently no cost-effective means of storing large quantities of electric energy, grid operators must balance energy supply and demand on a variety of timescales ranging from seconds to decades in order to maintain equilibrium across the network. Different solutions, ranging from second-to-second matching of supply and demand via automatic control of power plants to long-range planning for power plant and transmission adequacy have been developed to address this challenge.

Critical to these load balancing efforts is the ability to coordinate operations between electricity networks. Regional interconnection provides a cost-efficient way to address load and reliability concerns, allowing energy to flow readily to areas of high demand and avoiding system-wide breakdowns.

B. The Need for Reliability and Efficiency of Centralized Electricity Generation Led to Today's Highly Interconnected System.

The basic physical attributes of electricity have, in large part, shaped the electric power system we enjoy today. From an early crazy-quilt of small, local generators powering such urban uses as hotels and stores in downtown business districts, visionary entrepreneurs – most notably, former Edison employee Samuel Insull – developed a business model to centralize electric power generation and transmit electricity over copper wires to end users. That model was built on the development of alternating current, which allowed electricity to be transmitted at higher voltage (or "pressure") with much reduced energy losses, and on the invention of the transformer, which allowed electric current running long distances through high voltage power lines to be "stepped down" to a lower voltage for safe delivery to consumers. With the economies of scale provided by these developments, centralized generators were able to compete against – and eventually out-compete – local distributed generation and gas lamps, forming what we know today as investor-owned utilities.[9]

The rise of centralized power generation in the late 1800's and early 1900's led to "vertically integrated

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[9] A full discussion of these developments can be found in Harold L. Platt, *The Electric City* (Univ. of Chicago Press, 1991).

utilities that had constructed their own power plants, transmission lines, and local delivery systems." *New York v. F.E.R.C.*, 535 U.S. 1, 5 (2002). "Although there were some interconnections among utilities, most operated as separate, local monopolies subject to state or local regulation." *Id.* Under this regime, dispatch decisions were made within a single utility's system, which was limited by the Public Utility Holding Company Act to a single state. Formerly codified at 15 U.S.C. § 79 *et seq.*[10]

Fairly early in the development of the electricity industry, however, the state-centered approach began to break down, as utilities sought to enhance reliability and efficiency by interconnecting with adjacent utility networks, raising issues about the reach of state regulatory and rate-setting authority. *See Public Utilities Comm'n of Rhode Island v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927) (addressing Rhode Island's ability to regulate prices of electricity generated in-state and delivered over interconnecting transmission lines to a utility in Massachusetts).

In recognition of the growing interconnectivity of electricity transmission, Congress enacted the Federal Power Act of 1935. The Act charged the Federal Power Commission, the predecessor to FERC, with jurisdiction over "the transmission of electric energy in interstate commerce" and "the sale of electric

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[10] This statute was ultimately repealed by the 2005 Energy Policy Act.

energy at wholesale in interstate commerce." 16 U.S.C. § 824(b). Over the next several decades, the electricity grid became increasingly interconnected across states, and technological advances both diversified the sources of electricity generation and reduced the cost of long-distance transmission. Thus, more power plants developed and began serving more distant areas. *New York v. F.E.R.C.*, 535 U.S. at 7.

Today, most electricity in the continental United States is delivered over two major grids, the "Eastern Interconnect" and the "Western Interconnect," which are weakly connected to each other.[11] As a result, outside of Texas, "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving in interstate commerce." *New York v. F.E.R.C.*, 535 U.S. at 7, 9. A wholesale electricity customer in one state can now purchase electricity from a power producer in a neighboring state without difficulty.

The Court has long recognized the benefits of interconnection:

> The demand upon an electric utility for electric power fluctuates significantly from hour to hour, day to day, and season to season. . . . [T]he utility's generating capacity must be

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[11] Most of Texas is covered by a separate grid operated by the Electricity Reliability Council of Texas. This grid maintains limited interconnections with other states in order to avoid Federal Power Act jurisdiction.

> geared to the utility's peak load of demand, and also take into account the fact that generating equipment must occasionally be out of service for overhaul, or because of breakdowns. . . . The major importance of interconnection is that it reduces the need for the "isolated" utility to build and maintain "reserve" generating capacity.

Gainesville Utilities v. Florida Power Corp., 402 U.S. 515, 517 (1971).

The present interstate grids are the result of nearly a century of deepening interconnection. They are massive spider webs of high-voltage transmission lines allowing energy to flow across thousands of miles. Consequently, the electricity that consumers enjoy in their homes and businesses is increasingly generated at distant power plants, sometimes many states away. The regional nature of the transmission system and the fact that power plants do not tend to be sited near urban areas where most consumers live means that dependable electricity for consumers in one place is bound up with decisions about when to run a power plant hundreds of miles away. A large coal-fired power plant in Indiana, for example, can produce electric energy to balance New York City's energy consumption.

In short, the nature of electricity generation, transmission, and distribution changed dramatically over the first century of the sector's development. While consumers once received power from a relatively close source, electricity transmission is no longer

characterized by isolated fiefdoms limited in extent to the territory of one state.

C. Recent Legislative and Regulatory Changes Paved the Way for the Modern Regional Wholesale Electricity Markets.

Congress and FERC have responded to these profound structural changes with a regulatory regime intended to facilitate competitive, efficient, and reliable regional electricity markets. Since passage of the Federal Power Act, the federal government has become increasingly involved in shaping wholesale electricity markets. As technological advances led to diversified electric generating sources and long distance transmission across state lines, federal laws and regulations evolved to keep pace, laying the foundation for our contemporary regional electricity dispatch system.

Spurred originally by the energy crises of the 1970's, Congress initiated a series of steps that have led to the dynamic, regional wholesale markets for electric energy that exist today. First, Congress enacted the Public Utility Regulatory Policies Act of 1978 ("PURPA"). 16 U.S.C. § 2601 *et seq.* By requiring utilities to purchase electricity from nontraditional suppliers (qualifying cogeneration and small power production facilities), PURPA created, for the first time, an obligation on the part of vertically integrated

utilities to purchase energy at wholesale from non-affiliated entities.[12]

Congress continued to influence energy markets with enactment of the Energy Policy Act of 1992 ("EPAct 1992"), which compelled utilities to provide transmission services to unaffiliated wholesale generators on a case-by-case basis. 16 U.S.C. §§ 824j-824k.[13] Concluding that individual proceedings to enforce EPAact 1992 were too costly and time-consuming, FERC in 1996 promulgated Orders 888 and 889, which require public utilities that own high voltage transmission systems to offer non-discriminatory open access transmission service. *New York v. F.E.R.C.*, 535 U.S. at 10-11.

The structure of the power industry evolved significantly in response to these regulatory changes. Integrated utilities divested their generating assets, and new market participants emerged, including independent and affiliated power marketers, which do not own or operate any electric facilities but buy and sell electricity on the open market, and independent power producers (or "merchant generators"), which sell electricity to utilities but are not themselves regulated as a public utility. Regional

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[12] PURPA did so by directing FERC to promulgate rules requiring these utility purchases.

[13] EPAct 1992 similarly operated by directing FERC to order utilities to provide these transmission services.

Transmission Organizations, Order No. 2000, 89 FERC 61,285 at *7 (Dec. 20, 1999).

To manage the many new entrants and increasingly complex market structure, FERC attempted to organize owners of transmission lines into Independent System Operators ("ISOs") and Regional Transmission Organizations ("RTOs") as a way to promote grid reliability and to guard against the improper exercise of market power in the provision of transmission services. These independent, non-profit entities are charged with operating a high voltage transmission network owned by utilities in a way that allows open and equal access; they also administer electricity markets that match supply and demand in real time to maintain reliability across the network.[14]

These novel transmission governance structures have given rise, in turn, to the large regional electricity markets that exist today. The Pennsylvania-New Jersey-Maryland Interconnection ("PJM") is an RTO that coordinates the movement of wholesale electricity in all or parts of Delaware, Illinois, Indiana, Kentucky, Maryland, Michigan, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, Virginia, West Virginia, and the District of Columbia. The Midcontinent Independent System Operator ("MISO")

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[14] *See generally,* Energy Information Administration, *The Changing Structure of the Electric Power Industry: An Update* (1997), *available at* http://books.google.com/books?id=C5W8uxwMqdUC&printsec=frontcover&source=gbs_ge_summary_r&cad=0#v=onepage&q&f=false.

is an ISO/RTO that provides open access transmission and real-time load balancing services throughout the Midwest, including all or most of North Dakota, South Dakota, Nebraska, Minnesota, Iowa, Wisconsin, Illinois, Indiana, Michigan, and parts of Montana, Missouri, Kentucky, and Ohio. ISO New England is an RTO serving Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont. In addition, New York, California and Texas all have ISOs covering multiple utility service territories. Even in areas where ISOs or RTOs have not been established, supply and demand on the high voltage transmission network are balanced via less centrally coordinated organizational structures called power pools.

The crucial operational difference between ISOs or RTOs and power pools is in how power plants are dispatched to meet demand. In ISOs or RTOs, the grid operator manages a series of energy auctions, selecting bids from generators to sell electric energy necessary to meet forecast demand on the system. All accepted bids are paid the price offered by the highest accepted bid. This approach is known as bid-based dispatch. By contrast, in power pools, the grid operator dispatches power plants based upon the estimated operating costs of the power plants on the system. The power plants with lowest operating costs are dispatched first while those with higher operating costs are dispatched only when demand peaks. This approach is known as cost-based dispatch. In either case, underlying power plant economics determine

which generators are directed to turn on and which sit idle on any given day.

This regionalization of electricity market structures continues. Recently FERC issued Order No. 1000, which requires regional transmission planning and cost allocation on the part of all utilities, whether or not they are a participant in an organized wholesale market. And several states now require that their utilities be part of an ISO or RTO. At the same time, PJM and MISO, the two largest multi-state RTOs, are in renewed discussions and planning efforts to form a joint and common energy market that would cover all or part of 23 states and the District of Columbia.[15] Similar efforts at greater regional coordination are also ongoing in the Western Interconnect where the California ISO and PacificCorp, a neighboring utility, are forming an "Energy Imbalance Market" aimed at trading excess supply and demand across system interties. Order Accepting Implementation Agreement, 143 FERC 61,298, at *1 (June 28, 2013).

In short, just as the electricity grid has become physically interconnected over the past century, so too has the regulatory structure that controls its operations. This process has transformed the electric

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[15] *See* 2012 PJM-MISO Joint and Common Market Initiative, *available at* http://www.pjm.com/committees-and-groups/stakeholder-meetings/stakeholder-groups/pjm-miso-joint-common.aspx.

system from one that is driven by local imperatives to one that can respond quickly to changes in either supply or demand conditions across regions. Because the Transport Rule will create just such an economic change in supply, it is essential that it take account of the modern regulatory setting.

II. Today's Regional Electricity Markets Are Inconsistent with the Constraints Posed by the Court of Appeals Decision.

A. Modern Wholesale Electricity Markets Are Regional In Nature.

Modern wholesale electricity markets reflect the unique nature of electricity, the current physical structure of the U.S. electric system, and the legislative and regulatory history described above. Demand "varies widely from hour to hour," but electricity supply and demand must remain balanced for the grid to operate.[16] In many areas of the country, including many areas affected by the Transport Rule, organized wholesale electricity markets determine, through generator bids, which power plants will generate energy (or "dispatch") to facilitate this supply and demand balance. In less tightly organized power

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[16] S. Hunt, *Making Competition Work in Electricity* 32 (John Wiley & Sons, Inc., New York) (2002).

pools, plants are dispatched on an estimated marginal cost basis.[17]

Regardless of whether high voltage transmission is governed by an organized ISO/RTO or through a less centrally coordinated power pool, system operators uniformly rely on economics to determine which power plants to dispatch or turn on.[18] In general, cheaper plants – those with lower marginal operating costs – come on line first. In electricity market terminology, this means that "base load" plants, with high capital costs but the lowest marginal operating costs, are called first, along with renewable energy producers that have no fuel costs; "intermediate load" plants with lower capital costs but higher marginal operating costs are called next; and finally "peaking" capacity plants, with the lowest capital costs but highest marginal operating costs, are called last, when demand peaks.[19]

A simplified example of modern dispatch procedures illustrates how this coordination of dispatch via economics works. On any given day, the PJM system operator could call on a power plant in Ohio, then New Jersey, then Maryland to supply the energy

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[17] *See, e.g.*, United States Department of Energy: Solar Energy Technologies Program, *The Role of Electricity Markets and Market Design in Integrating Solar Generation* 1, Solar Integration Series, May 2011, *available at* http://www1.eere.energy.gov/solar/pdfs/50058.pdf.

[18] Joskow, *Creating a Smarter U.S. Electricity Grid* at 33.

[19] *See, e.g.*, *id.*

needed to meet demand for electricity in the District of Columbia. The operator would make these dispatch decisions based on the generator bids offered in an auction and any binding transmission constraints, also called congestion prices, that exist within the high voltage transmission network. Transmission constraints are generated when a transmission link between two areas of an electricity network is insufficient to allow the lowest cost supply of energy in one to serve demand in the other. Organized wholesale electricity markets produce shadow prices called congestion prices that reflect these physical transmission constraints. Ultimately, dispatch decisions are made based upon the marginal bid for power needed to meet demand plus any congestion price that applies.

At night, the Ohio plant might be called to serve the District of Columbia demand because congestion on the system is low and it is the most economical resource. On a hot summer afternoon, with many air conditioners running at full power, congestion on the network might limit the ability of energy to flow such distances. In response, PJM might instead dispatch nearby resources in Maryland that have higher marginal bids but lower congestion prices to serve demand in the District of Columbia.

In sum, operational decisions in PJM, like other organized wholesale markets and to a lesser degree the power pools, occur through a regional process that is driven by the underlying physics and economics of generation and transmission, combined with the

modern scale of electricity market structures. As a consequence, these decisions often do not respect state jurisdictions. Were EPA to craft a Transport Rule that treated state electric systems as isolated and ignored the realities of modern multi-state wholesale electricity markets, these markets would quickly respond to and quite possibly undo many of the Transport Rule's intended outcomes.

B. The Lower Court's Interpretation of the Good Neighbor Provision Is Incompatible with the Physical, Regulatory, and Economic Operation of the U.S. Electric System.

Because the electricity sector is now highly regionalized in both physical structure and operational management, regulatory interventions with significant economic effects cannot be isolated to a single state, just as ripples in a pond spread to its furthest edge. In drawing several "red lines" which EPA cannot cross in implementing the Good Neighbor provision of the Clean Air Act, the court of appeals failed to appreciate these basic facts about the modern U.S. electric system. As a result, the court placed an unnecessary burden upon both EPA and the firms and households that must ultimately bear the economic costs of its regulation.

In concluding that EPA cannot compel an upwind state to eliminate more than its current contribution to a downwind state's nonattainment problem, the

court of appeals made a seriously flawed threshold assumption that an upwind state's contribution is fixed. This assumption is simply wrong as a matter of fact. Today's highly interconnected and dynamic regional wholesale electricity markets – markets that adjust "hour by hour" – will alter dispatch as marginal costs change in response to regulatory requirements. This is true irrespective of whether the markets in question utilize a bid-based or cost-based dispatch system. The court's holding would force EPA to ignore these realities and behave as if the dramatic developments in the U.S. electric system over the last half century had not occurred.

In contrast, the Transport Rule that EPA adopted recognizes the realities of the current highly dynamic regional electricity market. It allocates responsibility for emission reductions at the regional level, based upon the availability of cost-effective pollution reduction opportunities at power plants. EPA's approach makes very good sense once one considers how the U.S. electric system operates and how it will respond to the imposition of additional pollution controls at power plants.

Moreover, a regional, market-based allocation of responsibility has the additional benefit of minimizing the costs of resolving the regional air pollution problem. By attempting to allocate the emissions reduction burden to the least-cost providers of reductions, the Transport Rule minimizes costs even if one or more states elects not to join the proposed EPA trading program.

At bottom, a requirement that a state reduce pollutant emissions from electricity production will increase marginal operating costs at power plants within its borders because they will install new pollution controls or burn more expensive, lower sulfur coal, or operate for fewer hours during the year. Changes in marginal operating costs will, in turn, affect regional dispatch decisions, whether that dispatch is bid-based or cost-based.

To take a simple example, suppose a power plant in State A is cheaper to operate than a plant in State B under the present regulatory regime, meaning that power will be dispatched from the plant in State A before the plant in State B, all else being equal. If new pollution controls alter the relative economics such that the plant in State A now becomes more expensive to operate than the plant in State B, the regional grid operator will now call power from the plant in State B, without regard to state boundaries, assuming for purposes of this simple example that there are no constraints that generate congestion prices. In this way, the state in which air pollution is generated, and the relative contribution to downwind nonattainment problems, is shifted due to regional operation of the wholesale electricity market. The lower court forbids EPA to account for these shifts because it mandates a focus on ex-ante upwind state-by-state contributions to downwind state nonattainment.

A state-centric pollution control regime, such as the one directed by the court of appeals, will have

serious difficulty adjusting to the dynamics of today's regional markets. This is particularly the case given the specific instructions of the court of appeals that EPA must rely on its static estimates of upwind state contribution to downwind state nonattainment. EPA might get lucky in allocating pollution burdens in a way that did not lead simply to a shift in the location of the pollution burden, or it might opt to overcontrol in all upwind states in order to guarantee elimination of the regional air pollution problem in downwind states, irrespective of any shift in the location of generation and consequent air pollutant emissions. But either solution will be far inferior – from an economic efficiency and pollution control perspective – to the sophisticated regional power plant emissions approach that EPA has crafted.

There are no doubt multiple means for allocating responsibility for the regional air pollution problem created by power plant emissions. But doing so in a way that rigidly adheres to state boundaries and ignores power plant economics makes little sense. As EPA understood,[20] regional markets for wholesale electric energy will adjust to any new costs imposed

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[20] EPA investigated this issue by using the Integrated Planning Model ("IPM") to assess its rulemaking. IPM is a complex model of the U.S. electricity system that simulates power plants, transmission constraints, and the regional structure of U.S. electricity markets. *See* EPA, *Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model*, at 2-9 (Aug. 2010), *available at* http://www.regulations.gov/#!documentDetail;D=EPA-HQOAR-2009-0491-0309.

on power plants in ways that are not constrained by state lines.

The court of appeals spelled out in some detail how it believed that EPA should allocate responsibility for interstate pollution problems using hypotheticals. ***EME Homer City,*** 696 F.3d 21. These hypotheticals usefully illustrate the court's misunderstanding of power system structure and power market operations. Consider the example the court proprovides of a downwind state that receives significant contributions to its nonattainment from three upwind states. In the court's hypothetical, each upwind state contributes 20 units of pollution to downwind state air, which itself exceeds attainment by 50 units. *Id.* The court believes that the proper procedure for EPA to take in this instance is simply to tell each upwind state to reduce its emissions by 16 2/3 units of pollution, thus resolving the downwind air pollution problem. *Id.*

This "solution" assumes both that the states' grids are not interconnected with each other and that electricity markets are not regional. It ignores the fact that regional electricity markets are likely to redistribute the 50 units of air pollution over the interstate high voltage transmission network in ways that may partially or totally undermine the effectiveness of the strategy.

For example, imposing costs in this simplistic fashion may cause pollution reductions in two of the upwind states, but actively increase pollution in the

third as a result of changes in relative bids into the wholesale market by generators. It may also cause emissions to *increase* in the downwind state for similar reasons. It may even cause emissions to shift from the downwind state to one or more of the upwind states. In short, predicting the outcome of a particular regulatory intervention requires EPA to think in terms of the physical and economic structure of the present electric power system, not in the simplistic and anachronistic fashion that animated the court of appeal's hypothetical. Because the court fails to consider that electricity markets will respond dynamically to imposition of new pollution controls, it believes it can substitute its relatively simple solution for the sophisticated modeling supplied by EPA.

In the real world, a power plant's total emissions depend on both the plant's emissions rate and the number of hours the plant operates. The state imposes pollution controls that impact the plant's emissions rate and marginal operating cost, but the state does not directly determine how frequently the plant is dispatched. That operational decision is a wholesale market-driven effect, not one orchestrated by each state. And the wholesale markets in question are almost entirely regional, not state-delimited or state-controlled. Even if a state were to mandate reductions in total emissions at one of its power plants, the effect would be to shift energy production for the regional system to another power plant, either within that state or in a neighboring state. The effect is similar to squeezing a balloon in one's hand. The

majority opinion below ignores this reality, much to the detriment of the impacted populations and regional electricity prices.

Further, given that EPA cannot compel state participation in its regional cap-and-trade market, allocation of pollution burdens based upon each upwind state's contribution to downwind state nonattainment is likely to lead to highly inefficient and hence unnecessarily costly outcomes. States that face low marginal abatement costs relative to their neighbors may well opt not to participate in the trading program. This would leave states that face high marginal abatement costs with little flexibility and far higher overall costs. At the national level, this outcome would generate far higher societal costs but identical pollution levels. Thus, utilizing the rigid, state-by-state allocation mandated by the court of appeals creates state-level incentives that are likely to reduce the cost effectiveness of EPA's approach.

By contrast, under EPA's cost-based allocation approach, whether or not states opt to participate in emissions trading, actions taken by power plants within individual states are far more likely to approximate the cost minimizing solution. While *Amici* recognize that cost-effectiveness alone cannot dictate interpretation of the Good Neighbor provision, we urge the Court to consider the difference in economic outcomes between the lower court's and EPA's views of the law. In our opinion, the difference is likely to be substantial.

Without endorsing any particular methodology for selecting states or for allocating pollution reduction burdens across them, *Amici* urge the Court to defer to EPA's expertise in implementing the Good Neighbor provision consistent with the realities of the modern multi-state electric power system. Allowing the agency sufficient flexibility to design a program with a regional focus is the optimal way to ensure that all states act as good neighbors in their implementation of air pollution controls. It is also the most effective way EPA has to minimize the costs of such a program. The decision below, by requiring a static, rigid, state-by-state approach to regional air pollution problems, is very likely to frustrate the statutory objective of the program and virtually certain to result in needless costs to electricity consumers. In contrast, by tailoring regulation to the facts on the ground, EPA's regional approach provides the greatest assurance that interstate causes of nonattainment of air quality standards will be cost effectively eliminated.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to reverse the misinformed decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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In The
Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

and

AMERICAN LUNG ASSOCIATION, *et al.*,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., *et al.*,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE INSTITUTE FOR POLICY INTEGRITY AT NEW YORK UNIVERSITY SCHOOL OF LAW AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This amicus brief considers the third of the Questions Presented:

> Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

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INTEREST OF THE AMICUS CURIAE[1]

The Institute for Policy Integrity at New York University School of Law [2] (Policy Integrity) is dedicated to improving the quality of government decisionmaking through advocacy and scholarship in the fields of administrative law, economics, and public policy. Policy Integrity is a collaborative effort of faculty at New York University School of Law; a full-time staff of attorneys, economists, and policy experts; law students; and a Board of Advisors composed of leaders in public policy, law, and government.

Policy Integrity and its directors have produced extensive scholarship on the economics and regulation of interstate pollution under the Clean Air Act. An area of special concern for Policy Integrity is the promulgation of federal environmental regulations justified by cost-benefit analysis. The question presented, above, directly bears on the use of cost-effectiveness criteria in interpreting and implementing environmental statutes. Policy Integrity has a significant interest in the outcome of the legal issues at stake—particularly in ensuring that federal agencies have the authority and flexibility to promulgate rational and economically efficient regulations.

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[1] The parties have submitted letters to the Clerk granting blanket consent to the filing of amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than amicus and its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] No part of this brief purports to present New York University School of Law's views, if any.

SUMMARY OF THE ARGUMENT

A central and original justification for the Clean Air Act has been to more effectively address the serious and complex spillover effects that result from interstate air pollution. Congress confronted the difficult problem of interstate air pollution through a series of revisions to the Clean Air Act over several decades, ultimately producing the current version of the so-called Good Neighbor Provision, [3] which defines the obligations upwind states owe to their downwind neighbors. *See* Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D). Crucially, the Good Neighbor Provision defines the allocation of responsibility between states for implementing air quality standards; it does not alter the level of health and welfare protection required by the statute. At no point has Congress ever prohibited the Environmental Protection Agency (EPA) or states from considering costs when they implement the Good Neighbor Provision. Indeed, the legislative history of this provision and related sections of the Act support the use of cost-minimizing market mechanisms to address interstate air pollution.

For decades, since its earliest interpretations of the Good Neighbor Provision, EPA has consistently determined—during both Republican and Democratic administrations—that the provision

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[3] As explained further below, Congress has revised the Good Neighbor Provision several times over the past few decades, and it has been renumbered as well as reworded. This brief uses the phrase "Good Neighbor Provision" to refer to all of the versions of the statutory provision. The brief will specify when it is referring to a particular version of the provision.

authorizes the consideration of costs in crafting a program that effectively mitigates interstate air pollution while minimizing the unnecessary use of resources to achieve that goal. Similarly, for decades and through administrations of both parties, EPA has employed interstate emissions trading systems as a tool to cost-effectively achieve ambient air quality goals.

In accordance with EPA's longstanding interpretation of the Good Neighbor Provision, the Transport Rule at issue in this case considers costs in combination with other factors to determine when upwind states have violated their statutory obligations to downwind states. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208, 48,248 (Aug. 8, 2011) [hereinafter Transport Rule]. Congress did not prohibit the agency from considering costs under this section through either the text or the statutory structure. Moreover, the text of the statute and policy considerations support the agency's interpretation of the provision. Instead of substituting its own policy judgment for how best to address the complex problem of interstate air pollution—as the D.C. Circuit did—this Court should defer to the agency's reasonable interpretation of the Good Neighbor Provision, allowing the agency to utilize its expertise to cost-effectively mitigate interstate air pollution.

ARGUMENT

I. CONGRESS DESIGNED THE GOOD NEIGHBOR PROVISION AS PART OF A COMPREHENSIVE, FLEXIBLE SOLUTION TO THE ECONOMICALLY AND SCIENTIFICALLY COMPLEX PROBLEM OF INTERSTATE AIR POLLUTION

In the D.C. Circuit's majority opinion below, Judge Kavanaugh belittles the Good Neighbor Provision, calling it a "mousehole"—an "ancillary provision" that contains just one minor obligation among the many requirements for implementing air quality standards, and maintaining that the provision is too "narrow" to possibly authorize EPA to design a comprehensive, cost-effective response to interstate air pollution. *EME Homer City Generation v. EPA*, 696 F.3d 7, 28 (D.C. Circuit 2012) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)). Far from being a "mousehole," the Good Neighbor Provision directly serves one of the most central and original rationales for the Clean Air Act: efficiently tackling the challenges of interstate air pollution. The plain language, statutory context, and legislative history of the Good Neighbor Provision all confirm that Congress never prohibited EPA and the states from considering or minimizing costs as they work together to achieve air quality goals.

A. Interstate Externalities Provide a Central Justification for Federal Environmental Protections

Air pollution is a classic negative economic externality: polluting activities impose uncompensated health and welfare costs on third

parties. When those third parties cannot efficiently bargain with the polluters to mitigate those negative external costs, the resulting market failure justifies government regulation. *See* U.S. Office of Mgmt. & Budget, *Circular A-4: Regulatory Analysis* 4 (2003).

Additionally, air pollution famously "does not know" or respect state lines. S. Rep. No. 88-638, at 3 (1963). Subject to weather patterns, air pollution emitted from inside an upwind state can drift into and harm third parties in a downwind state. Even assuming that states adequately respond to all intrastate environmental problems, any individual state has little incentive to control the interstate air pollution externalities it generates. After all, the upwind state receives the productive benefits of the polluting activity without having to bear the full costs, which have been opportunistically externalized to a downwind state. Consequently, the upwind state has a powerful motive to allow its industries to exceed the socially optimal level of emissions. *See* Richard L. Revesz, *Federalism and Interstate Environmental Externalities*, 144 U. Pa. L. Rev. 2341, 2343 (1996). The potential for externalization of air pollution costs to other states means that state-level regulation may not sufficiently address air pollution. Indeed, "[t]he presence of interstate externalities is a powerful reason for intervention at the federal level." Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. Rev. 1210, 1222 (1992); *see also* Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 Harv. L. Rev. 555, 557 n.3 (2001).

The particular case of interstate air pollution presents an important wrinkle on the classic story of externalities. The Clean Air Act separately obligates every state to comply with standards specifying the maximum permissible concentrations of certain "criteria" pollutants, *see* 42 U.S.C. §§ 7409-10, a category that includes some of the pollutants likely to cross borders and cause interstate harms, such as sulfur dioxide, *see, e.g.*, Primary National Ambient Air Quality Standard for Sulfur Dioxide; Final Rule, 75 Fed. Reg. 35,519, 35,522 (June 22, 2010). The fact that an upwind state contributes to a downwind state's ambient concentrations does not relieve the downwind state of any part of its obligation to comply with the federal ambient standards. Therefore, the externality imposed by upwind pollution often is not health and welfare costs, since the downwind state is still charged with achieving the overall target level of health and welfare. Instead, the negative externality is often the additional pollution abatement costs that the downwind state must now impose on itself to offset the upwind pollution. *See* Revesz, 144 U. Pa. L. Rev. at 2352.

Indeed, those very ambient air quality standards create an additional incentive for upwind states to externalize pollution. Not only does the upwind state want to enjoy the productive benefits of the polluting activity without facing the full health and welfare costs, but also it is motivated to try to avoid the regulatory costs by shifting the burden onto downwind states. In the 1970s and 1980s, following the enactment of the Clean Air Act, upwind states began having taller emissions stacks, sending their emissions into downwind states rather than

curtailing the polluting activity: in 1970, only two stacks in the United States were higher than 500 feet; by 1985, more than 180 stacks were higher than 500 feet, and twenty-three were higher than 1000 feet. *Id.* at 2352-53. Statutory provisions and EPA regulations have since addressed some, but not all, of the concerns associated with tall stacks. *Id.* at 2354. Moreover, upwind states may be inclined to encourage their polluting sources to locate near their downwind borders to effectively export their uncontrolled pollution out of state. *Id.* at 2350-54.

Theoretically, states or private parties could address these externalities on their own, by negotiating with the polluting state and offering payments in exchange for pollution abatement. *See* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 15 (1960) (explaining that, in the absence of transaction costs, parties would bargain to pay polluters in exchange for reducing pollution). History, however, strongly suggests that this approach is not realistic. This Court's 1907 ruling in *Georgia v. Tenn. Copper Co.* offers a good example of the limitations of voluntary interstate bargaining: Georgia went to court only after "a vain application to the State of Tennessee for relief." 206 U.S. 230, 236. In addition to the shortcomings of bargaining, the same case further shows that the common law is similarly unlikely to produce a timely, efficient remedy to interstate air pollution problems. *See id.*, *enforced by* 237 U.S. 474 (1915) (ending nine years of litigation with modest emissions reductions requirements).

The need for federal action on interstate air pollution motivated the original Clean Air Act. In

1963, Congress highlighted the air pollution problems created when growing urban areas and their impacts "cross the boundary lines" between states. Pub. L. No. 88-206, § 1(a), 77 Stat. 392, 392; *see also* Hon. Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 Ariz. L. Rev. 17, 18 (1968) ("The philosophy of the Clean Air Act of 1963 was to encourage state, regional, and local programs to control and abate pollution, while spelling out the authority of the national government to step into interstate situations with effective enforcement authority."). In fact, encouraging regional control efforts was listed as an original legislative purpose. Pub. L. No. 88-206, § 1(b)(4), 77 Stat. 392, 393.

Initially, Congress attempted to address interstate air pollution largely by promoting bargaining among the states. To that end, Congress empowered the federal government to convene interstate conferences, *id.* § 5(c), 77 Stat. at 396-97, and to set up interstate planning commissions, Air Quality Act of 1967, Pub. L. No. 90-148, § 106, 81 Stat. 485, 490.

But by 1970, no interstate planning commission had ever been empaneled, S. Rep. No. 91-1196, at 6 (1970), and only eight, largely ineffective conferences had ever been convened on interstate pollution, Bruce M. Kramer, *Transboundary Air Pollution and the Clean Air Act*, 32 U. Kan. L. Rev. 181, 189 (1983). "Disappointed" in these results, S. Rep. No. 91-1196, at 6, in 1970 Congress abandoned its exclusive reliance on the conference procedure and imposed a more regulatory solution by moving interstate air pollution issues under the rubric of section 110's

State Implementation Plans (SIPs). Specifically, this first version of the Good Neighbor Provision required SIPs to provide for "intergovernmental cooperation," including measures to ensure upwind pollution would not "interfere with" downwind air quality standards. *See* Clean Air Amendments of 1970 § 110(a)(2)(E), Pub. L. No. 91-604, 84 Stat. 1676, 1681. In short, the barriers to effective interstate negotiations were simply too intractable, and the market failures created by the interstate air pollution externalities required a more comprehensive federal response. *See* U.S. Office of Mgmt. & Budget, *Circular A-4*, at 5 (explaining that "problems that spill across State lines . . . are probably best addressed by Federal regulation").

Though the initial version of the Good Neighbor Provision created by the 1970 Amendments was later deemed "inadequate," H.R. Rep. No. 95-294, at 330 (1977), Congress remained committed to designing a "better solution" to the "serious" problem of interstate air pollution. *Id.* The 1977 Amendments began to establish the Clean Air Act's modern approach to interstate air pollution. Central to this structure was a stronger Good Neighbor Provision, which replaced the vague call for "intergovernmental cooperation" with a specific mandate for "adequate provisions . . . prohibiting any stationary source within the State from emitting any air pollutant in amounts which will . . . prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard." Clean Air Act Amendments of 1977 § 110(a)(2)(E), Pub. L. No. 95-95, 91 Stat. 685, 693; *see also id.*, 91 Stat. at 721-22, 724-25 (creating section 123 constraining tall stacks and section 126 allowing

states to petition EPA to declare violations of the Good Neighbor Provision).

The final elements of the modern approach took shape in 1990, when Congress made two important changes to the language of the Good Neighbor Provision. First, it expanded the scope from individual stationary sources to "any . . . emissions activity"; second, it changed the standard from "prevent attainment or maintenance" to "contribute significantly to nonattainment in, or interfere with maintenance by."[4] Clean Air Act Amendments of 1990 § 110(a)(2)(D), Pub. L. No. 101-549, 104 Stat. 2399, 2404. These modifications gave EPA and the states more flexibility to address cumulative emissions from multiple sources and activities, instead of just regulating individual, stationary sources.

B. The Good Neighbor Provision Is a Key Element of the Clean Air Act's Overall Response to Interstate Externalities

The Good Neighbor Provision, housed within the requirements for State Implementation Plans (SIPs), requires:

> adequate provisions (i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity within the

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[4] The statute thus provides two distinct avenues for finding a violation of the Good Neighbor Provision: (1) an upwind state "contribute[s] significantly to nonattainment" of ambient air quality standards in a downwind state, or (2) an upwind state "interfere[s] with" a downwind state's "maintenance" of the ambient air quality standards. This brief will use "contribute significantly" as a shorthand to refer to both provisions.

> State from emitting any air pollutant in amounts which will (I) contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standards, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility.

Clean Air Act § 110(a)(2)(D), 42 U.S.C. § 7410(a)(2)(D). The Act provides multiple mechanisms to ensure the obligation is satisfied. After EPA issues or revises national ambient air quality standards, each state must submit a SIP for EPA's approval that adequately addresses the Good Neighbor Provision. Clean Air Act § 110(a), 42 U.S.C. § 7410(a). If a state fails to submit an adequate SIP, EPA "shall" develop a Federal Implementation Plan to enforce the Good Neighbor Provision. Clean Air Act § 110(c), 42 U.S.C. § 7410(c). If EPA finds an approved SIP is "substantially inadequate" with respect to the Good Neighbor Provision, the agency must call for revisions. Clean Air Act § 110(k)(5), 42 U.S.C. § 7410(k)(5). Finally, a downwind state or local government may petition EPA for a finding that a source in an upwind state is violating the Good Neighbor Provision. Clean Air Act § 126, 42 U.S.C. § 7426. The subject of this case, the Transport Rule, concerns a Federal Implementation Plan under section 110(c), but the content of the substantive standard contained in the Good Neighbor Provision remains the same regardless of how it is enforced.

The Good Neighbor Provision works together with and alongside several other provisions in the Clean Air Act to address interstate pollution. Some of these other provisions, like sections 106 and 176A on interstate commissions, 42 U.S.C. §§ 7406, 7506a, harken back to Congress's first efforts to address the problem. Some, like section 123 on stack heights, 42 U.S.C. § 7423, attempt to mitigate particular perverse incentives that may result in socially inefficient levels of interstate pollution, *see* Revesz, 144 U. Pa. L. Rev. at 2349, 2354-58. Some, like section 184 on interstate ozone pollution, 42 U.S.C. § 7511c, and Title IV on acid rain pollution, 42 U.S.C. §§ 7651-7651o, target specific pollutants and sources. But only the Good Neighbor provision applies more broadly to "any pollutant" emitted by "any source or . . . activity" that interferes with air quality and visibility standards in other states, and creates binding obligations on states while still giving them flexibility in designing a response.

C. From the Clean Air Act's Earliest Approaches to Interstate Pollution, Congress Has Never Prohibited the Consideration of Costs or the Pursuit of Cost-Effective Strategies

Since 1963, the Clean Air Act has listed four fundamental statutory purposes: one is to "protect the Nation's air resources so as to promote the public health and welfare *and the productive capacity*" of the country; another is to assist the development of regional air pollution control programs. Pub. L. No. 88-206, § 1(b), 77 Stat. at 393 (emphasis added). These goals remain key statutory purposes today. 42 U.S.C. § 7401(b) (note that the phrase "and enhance

the quality" has been added to the first goal of protecting air resources). As recently as the 1990 Amendments, Congress expressed its intent for EPA to continue to balance these underlying objectives, by "exercis[ing] equally" "both the regulatory tools to accomplish cleaner air and the flexibility to protect our industrial and productive capacity." H.R. Rep. No. 101-490, at 163 (1990).

For example, the now obsolete interstate conference process from 1963 authorized the federal government to recommend "reasonably calculated" abatement strategies, and the Attorney General to initiate litigation in which the court was instructed to weigh "the physical and economic feasibility . . . , [against] public interest and the equities." Pub. L. No. 88-206,§ 5(d)-(g), 77 Stat. at 397-98; *see also* Pub. L. No. 90-148, §§ 108(c)-(h), 81 Stat. at 493-96; S. Rep. No. 90-403, at 3 (1967) (noting that the Clean Air Act's success would depend in part on "the development of plans for air regions, to implement the established ambient air standards giving due consideration of factors of technical and economic feasibility"). Though, as discussed above, the conference process ultimately proved too cumbersome and weak and was replaced, it shows the start of a historical trend of Congress not foreclosing cost considerations from interstate air pollution remedies.

Similarly, when strengthening the Good Neighbor Provision in 1977, Congress noted that the "economic and competitive . . . positions" of emissions sources in different states were one important factor in designing an effective interstate air pollution program. S. Rep. No. 95-127, 41-42 (1977). Even

more telling than such occasional references to economic considerations, though, is the complete absence from the legislative histories in 1963, 1967, 1970, 1977, and 1990 of any mention of a congressional intent to prohibit the consideration of costs or the pursuit of cost-effective strategies.

D. Congress Explicitly Authorized EPA and the States to Use Market Mechanisms to Address Interstate Air Pollution in Order to Achieve Environmental Goals Cost-Effectively

In 1990, as part of a broad initiative to harness economic theory to design more efficient air quality regulations, Congress added several provisions to the Clean Air Act authorizing the use of market-based incentives to control emissions.[5] Notably, Congress inserted language explicitly allowing State Implementation Plans to use:

> enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of this chapter.

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[5] Perhaps the best known is the highly successful program to control interstate acid rain pollution under Title IV of the Clean Air Act. 42 U.S.C. §§ 7651-7651o; *see* Gabriel Chan, Robert Stavins et al., *The SO_2 Allowance Trading System and the Clean Air Act Amendments of 1990* at 31 (Nat'l Bureau of Econ. Research, Working Paper No. 17,845, 2012) (noting the program is "viewed as a success by almost all measures").

42 U.S.C. § 7410(a)(2)(A). Similarly, Federal Implementation Plans—like the one proposed by the Transport Rule—are authorized to use these same market-based tools (except for fees). 42 U.S.C. § 7602(y). Because the Good Neighbor Provision is one of the "applicable requirements" of implementation plans, the plain language of section 110 makes clear that market mechanisms like trading are available to satisfy the requirements of the Good Neighbor Provision. The 1990 Amendments arguably further facilitated trading under the Good Neighbor Provision by giving EPA and the states more flexibility to address cumulative emissions from multiple sources and activities, instead of just regulating individual, stationary sources. *See* Pub. L. No. 101-549, 104 Stat. at 2404.

The purpose of using market mechanisms like trading is to achieve the same environmental goal at a lower cost (or a better environmental outcome at the same cost) by concentrating pollution control efforts on the least-cost abatement opportunities. *See* U.S. Office of Mgmt. & Budget, *Regulatory Impact Analysis: A Primer* 6 (2011) (recommending "trading . . . as an approach that might achieve the same [environmental] gain at a significantly lower cost"). As many of the drafters of the Clean Air Act Amendments of 1990 stated, "the overall goal" of the various trading programs added in 1990 was "to permit an aggregate least-cost solution." *See* 136 Cong. Rec. 35,000, 35,044, 35,759 (Oct. 26, 1990) (identical phrases appearing in statements of Rep. Sharp, Rep. Hall, and Sen. Simpson); *accord* 133 Cong. Rec. 1382 (Jan. 16, 1987) (statement of Sen. Proxmire). In short, Congress explicitly authorized the use of trading to achieve interstate goals like the

Good Neighbor Provision, as a way for EPA and the states to minimize the aggregate costs of achieving these pollution reductions. Therefore, EPA and the states must not be prohibited from considering and minimizing costs under the Good Neighbor Provision, since that is the whole point of authorizing trading.

II. MULTIPLE PRESIDENTIAL ADMINISTRATIONS OVER SEVERAL DECADES HAVE CONSISTENTLY INTERPRETED THE GOOD NEIGHBOR PROVISION TO PERMIT FLEXIBLE INTERSTATE POLLUTION-CONTROL MECHANISMS THAT CONSIDER AND MINIMIZE COSTS

For over three decades, under both Republican and Democratic presidential administrations, EPA has interpreted the Good Neighbor Provision to authorize pursuit of cost-effective, regional strategies to mitigate interstate air pollution externalities. For more than two decades, presidents and their EPA administrators—again from both parties—have similarly interpreted the Clean Air Act to authorize the use of market mechanisms to minimize the costs of achieving goals like those under the interstate air pollution programs. As explained in more detail below, a consistent interpretation by an agency is entitled to additional deference. On this point, EPA's remarkably consistent interpretation of the statutory language in the Good Neighbor Provision is highly relevant.

A. EPA Has Consistently Interpreted the Good Neighbor Provision to Allow for Consideration of Costs When Addressing Interstate Air Pollution

For decades, EPA has interpreted the relevant Clean Air Act provisions to permit it to consider costs when regulating interstate air pollution. For example, under the Carter Administration, EPA believed the Good Neighbor Provision gave it authority to require "generally comparable emission limits for comparable sources" in different states. Interstate Pollution Abatement; Notice of Proceedings under Section 126 of the Clean Air Act and Hearing, 45 Fed. Reg. 17,048, 17,049 (1980). Moreover, in the same notice, EPA asked for comments on whether it should "consider the application of reasonably available control technology (RACT) by the contested sources to be sufficient in and of itself to avoid a finding of impermissible interstate pollution." *Id.* at 17,049. EPA had previously defined RACT to include a consideration of cost factors. State Implementation Plans; General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas—Supplement (on Control Technique Guidelines), 44 Fed. Reg. 53,761, 53,762 (Sept. 17, 1979) (defining RACT as "[t]he lowest emission limitation that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility"). Though the proceeding on interstate violations was not completed during the Carter Administration, it shows that from EPA's earliest statutory interpretations of the Good Neighbor Provision, the agency felt it could consider

factors beyond the mere volume of emissions contributions—including economic considerations—when resolving interstate air pollution problems. EPA's present approach under the Transport Rule is consistent with this earliest interpretation, as the cost-effectiveness criterion is one reasonable way of setting "generally comparable emission limits for comparable sources."

The Reagan Administration's EPA went a step further and made costs an explicit factor that could be considered in assessing violations of the Good Neighbor Provision. For example, when the Reagan EPA finalized the above proceeding that the Carter EPA had initiated, it noted that the relative allocation of pollution abatement responsibilities among states "may vary depending on a number of circumstances, possibly including social and economic factors." Interstate Pollution Abatement; Final Determination, 47 Fed. Reg. 6624, 6626 (Feb. 16, 1982). In developing a set of criteria for determining if an upwind state had violated the Good Neighbor Provision, the Reagan EPA listed "the relative costs of pollution abatement between sources that contribute to a violation." Interstate Pollution Abatement; Proposed Determination, 49 Fed. Reg. 34,851, 34,859 (Sept. 4, 1984), *approved in* Final Determination under section 126 of the Clean Air Act (Interstate Pollution Abatement), 49 Fed. Reg. 48,152, 48,156-57 (Dec. 10, 1984) (noting the particular relevance of costs in determining the remedy for a violation of the Good Neighbor Provision).[6]

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[6] At the time, the statutory provision in effect was the old section 110(a)(2)(E), which—as discussed above—was worded

When EPA began to take more proactive steps during the Clinton Administration to regulate interstate air pollution directly under the Good Neighbor Provision, it based its criteria for determining which emissions "contribute significantly" to downwind nonattainment on "both air quality factors relating to amounts of upwind emissions and their ambient impact downwind, as well as cost factors relating to the costs of the upwind emissions reductions." Finding of Significant Contribution and Rulemaking for Certain States in the Ozone Transport Assessment Group Region for Purposes of Reducing Regional Transport of Ozone, 63 Fed. Reg. 57,356, 57,376 (Oct. 27, 1998) [hereinafter NO_x SIP Call].

When President George W. Bush's EPA updated and expanded the interstate air pollution rules under the Good Neighbor Provision, it, too, incorporated cost considerations into its criteria for addressing those states that "contribute significantly" to downwind pollution. Under the Clean Air Interstate Rule (CAIR), cost factors were one of EPA's two primary considerations in determining significant contributions to interstate air pollution. Rule to Reduce Interstate Transport of Fine Particulate Matter and Ozone (Clean Air Interstate Rule); Revisions to Acid Rain Program; Revisions to the NO_x SIP Call, 70 Fed. Reg. 25,162, 25,174 (May 12,

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differently to prohibit upwind emissions that "prevent attainment or maintenance," rather than "contribute significantly to nonattainment . . . or interfere with maintenance." Nonetheless, EPA interpreted the "prevent attainment" language to prohibit "substantial" or "significant" contributions from upwind states, *see, e.g.*, 47 Fed. Reg. at 6628; 49 Fed. Reg. at 34,859.

2005) [hereinafter CAIR]. EPA took costs into account by "mandating emissions reductions in amounts that would result from application of highly cost-effective controls." *Id.* at 25,175.

In the Transport Rule at issue here, in line with longstanding agency practice and recent court rulings, the Obama EPA incorporated a slightly modified consideration of costs into its assessment of whether upwind states' emissions violate the Good Neighbor Provision. Transport Rule, 76 Fed. Reg. at 48,248. The Transport Rule analyzed "both cost and air quality improvement to identify the portion of a state's contribution that constitutes its significant contribution to nonattainment and interference with maintenance." *Id.* The Transport Rule "defines each state's significant contribution to nonattainment and interference with maintenance as the emission reductions available at a particular cost threshold in a specific upwind state which effectively address nonattainment and maintenance of the relevant NAAQS in the linked downwind states of concern." *Id.* Thus, under the Transport Rule, EPA interpreted the Good Neighbor Provision to authorize cost-effective strategies to implement interstate air pollution controls—much as agency actions under four previous presidential administrations had also interpreted the statute.

B. EPA Has Consistently Interpreted the Good Neighbor Provision to Allow for Interstate Emissions Trading Mechanisms as a Way to Achieve Cost-Effective Pollution Reductions

For over twenty years, presidents and their EPA administrators have interpreted the Clean Air Act to authorize the use of emissions trading systems as a

way to pursue cost-effective controls of interstate air pollution. Upon signing the 1990 Clean Air Act Amendments, which added new language on market incentives to section 110, President George H.W. Bush directed EPA to use the statute's multiple new provisions on flexibility and trading to "implement this bill in the most cost-effective manner possible." Statement on Signing the Bill Amending the Clean Air Act, 1990 Pub. Papers 1602, 1603 (Nov. 15, 1990). Though George H.W. Bush's EPA focused its attentions on the bill's related provisions creating cost-effective, market incentives to control interstate acid rain pollution, *see* E. Donald Elliott, *Lessons from Implementing the 1990 CAA Amendments*, 40 Envtl. L. Rep. 10,592 (2010), each subsequent administration has utilized the Good Neighbor Provision to institute a cost-minimizing emissions trading system.

The Clinton EPA's signature effort to enforce the Good Neighbor Provision, the NO_x SIP Call, featured an optional trading program. 63 Fed. Reg. at 57,456. EPA "encourage[d] States to consider electric utility and large boiler controls under a cap-and-trade program as a cost-effective strategy." *Id.* at 57,359. It created a model program, which states could opt into. EPA explained in the rule that a regional trading system would allow states to achieve the required emissions reductions at the least cost. *Id.* at 57,400.

Likewise, the George W. Bush EPA crafted an interstate emissions trading mechanism in CAIR. Similar to the 1998 NO_x SIP Call, CAIR allowed states to opt into a model interstate emissions trading program. 70 Fed. Reg. at 25,229. The agency explained, "If States choose to . . . participate in the

cap and trade program, allowances could be freely traded, encouraging least-cost compliance over the entire region." *Id.* at 25,231.

Building on the cost-effective trading approach in those two earlier efforts to implement the Good Neighbor Provision, in the Transport Rule, Obama's EPA designed "air quality-assured trading programs" to "ensure that necessary reductions will occur within every covered state." 76 Fed. Reg. at 48,210. EPA explained, "the trading component of the Transport Rule provides flexibility to the power sector and enables industry to comply with the emission reduction requirements in the most cost-effective manner . . . thus minimizing overall costs." *Id.* at 48,347.

In short, EPA has long viewed interstate trading mechanisms as both authorized under the Good Neighbor Provision and as a key tool for pursuing cost-effective approaches to interstate air pollution. Through these trading regimes, EPA maintains the same overall level of air quality in the downwind states while allowing states to prioritize their abatement strategies in a cost-effective manner. If EPA and the states are authorized to use trading to implement the Good Neighbor Provision cost-effectively, the Good Neighbor Provision must also more generally authorize the consideration and minimization of costs.

III. EPA'S USE OF A COST-EFFECTIVENESS FRAMEWORK TO IMPLEMENT THE GOOD NEIGHBOR PROVISION IS A PERMISSIBLE, REASONABLE, AND PRUDENT STATUTORY INTERPRETATION

A. The Court Should Defer to the Agency's Reasonable and Longstanding Statutory Interpretations Since Congress Has Not Unambiguously Addressed the Precise Question

Where, as here, an agency adopts a reasonable interpretation of an ambiguous statutory provision, a court should defer to the agency's interpretation rather than substitute its own policy judgment. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Under *Chevron*, a court reviewing "an agency's construction of the statute which it administers . . . is confronted with two questions." *Id.* at 842. First, the court must examine "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, . . . the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. "If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute." *Id.* at 843. Instead, it moves to the second step of the analysis, wherein, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*

Here, because EPA has for decades consistently interpreted the Good Neighbor Provision to authorize the consideration and minimization of costs, the Court should afford additional deference to the agency. This Court has repeatedly recognized the importance of "accord[ing] particular deference to an agency interpretation of longstanding duration." *Alaska Dept. of Envtl. Conservation v. EPA*, 540 U.S. 461, 487 (2004) (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)) (internal quotation omitted). The Court has explained, "While not conclusive, it surely tends to show that the EPA's current practice is a reasonable and hence legitimate exercise of its discretion to weigh benefits against costs that the agency has been proceeding in essentially this fashion for over 30 years." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 224 (2009) (holding that EPA's use of cost-benefit analysis was permissible under section 1326(b) of the Clean Water Act, an interpretation that EPA had espoused since the late 1970s). The thirty-year history of agency interpretation in this case is remarkably similar, and EPA deserves a similar level of "particular deference" on interpreting the Good Neighbor Provision.

B. The Clean Air Act Does Not Clearly Prohibit EPA's Interpretation of the Good Neighbor Provision and, in Fact, Supports the Agency's Interpretation

The Good Neighbor Provision instructs:

> Each [state implementation] plan shall— . . . (D) contain *adequate provisions*—(i) prohibiting, consistent with the provisions of this subchapter, any source or other type of emissions activity

> within the State from emitting any air pollutant in *amounts* which will—(I) *contribute significantly to nonattainment in, or interfere with maintenance by*, any other State with respect to any such national primary or secondary ambient air quality standard.

42 U.S.C. § 7410(a)(2) (emphasis added). The Clean Air Act nowhere defines such key terms as "adequate," "amounts," "contribute significantly to nonattainment," or "interfere with maintenance." *See, e.g.*, *Michigan v. EPA*, 213 F.3d 663, 674 (D.C. Cir. 2000) ("Nothing in the text of the new section or any other provision of the statute spells out a criterion for classifying 'emissions activity' as 'significant.'"); *id.* at 697 (Sentelle, J., dissenting) ("Neither did it define amount."). The plain language of Good Neighbor Provision does not unambiguously speak to the matter of cost-effectiveness.

At most, the statute is silent on the issue of cost-effectiveness. The question of whether perceived statutory silence indicates a clear congressional prohibition often turns on context. For example, in *Whitman v. American Trucking*, this Court held that EPA was not permitted to consider costs in the unique context of setting the National Ambient Air Quality Standards under section 109(b)(1) of the Clean Air Act. 531 U.S. 457, 471 (2001). However, as the Court later explained in *Entergy*, "*American Trucking* . . . stands for the rather unremarkable proposition that sometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion." 556 U.S. at 223.

In particular, *American Trucking* draws a sharp contrast between sections of the Clean Air Act that

set air quality standards and sections that implement those standards. Section 109 directs EPA to set ambient air quality standards at levels "requisite to protect the public health" with "an adequate margin of safety." 42 U.S.C. § 7409(b)(1). The question before the Court in *American Trucking* was whether that particular language vested EPA with "the power to determine whether implementation costs should moderate national air quality standards." 531 U.S. at 468. Given that the fundamental purpose of the section was to set standards necessary to safeguard public health and welfare, the Court found it "implausible" that Congress would have wanted EPA to also consider costs and yet forgot to mention it in the statute. *Id.* The Court contrasted section 109(b)(1) with other provisions of the Clean Air Act—including section 110—that focused not on setting public health and welfare goals, but instead on implementing them. *Id.* at 469-70. The task of implementation, the Court said, "would be impossible . . . without considering which abatement technologies are most efficient, and most economically feasible." *Id.* at 470. The question before the Court here—how to properly interpret the Good Neighbor Provision—deals with such a task of implementation that necessitates consideration of economic efficiency: indeed, the Good Neighbor Provision appears in section 110, which is entitled "State *Implementation* Plans." 42 U.S.C. § 7410 (emphasis added).

The issue at stake now is not the level at which to set air quality standards to safeguard public health and welfare; those levels have already been independently set under section 109(b)(1), and will not be affected by the Transport Rule. Instead, the

Transport Rule is meant to implement those standards in the most cost-effective manner, by efficiently allocating abatement responsibilities between the states. The choice of a cost-effective trading mechanism will not affect the level of air quality achieved, but only the total cost of achieving it. Especially for such provisions that deal with issues of implementation, EPA should have broad discretion to pursue cost-effective and flexible strategies unless specifically prohibited by the plain text of the statute.

Therefore, to the extent that the Good Neighbor Provision is silent on cost considerations, the case is much more analogous to *Entergy* than to *American Trucking*. In *Entergy*, the Court noted that the relevant section was "silent not only with respect to [cost factors] but with respect to all potentially relevant factors. If silence here implies prohibition, then the EPA could not consider *any* factors in implementing [the relevant section]—an obvious logical impossibility." 556 U.S. at 222. Similarly, the Clean Air Act provides no instructions on the criteria EPA should use to determine which state regulations would be "adequate" to implement the Good Neighbor Provision's prohibition on "amounts" of interstate pollution that "contribute significantly to" violations or "interfere with" air quality standards. As in *Entergy*, statutory context suggests that congressional silence on the criteria for implementing the Good Neighbor Provision does not unambiguously prohibit cost considerations. Rather, EPA has discretion to adopt any reasonable interpretation of the statutory language.

Cost-effectively apportioning the states' obligations to achieve air quality standards is a reasonable interpretation of the Good Neighbor Provision. In fact, the plain language, statutory context, and legislative history of the provision offer strong support for interpreting the language with cost-minimization principles in mind. For example, as explored in depth above, Congress explicitly provided that the "adequate provisions" required by the Good Neighbor Provision may utilize cost-minimizing tools like emissions trading. Similarly, the history of interstate emissions programs under the Clean Air Act reveals a consistent legislative intent to rationally weigh economic considerations and a consistent agency interpretation, going back decades, that has emphasized cost-effectiveness criteria.

Of all the terms in the Good Neighbor Provision that may support a reasonable interpretation with respect to cost-effectiveness, particular attention has been given to the phrase "contribute significantly" and especially the word "significant." In holding that "there is nothing in the text, structure, or history of [the Good Neighbor Provision] that bars EPA from considering cost in its application," *Michigan*, 213 F.3d at 679, the D.C. Circuit noted that, "In some contexts, 'significant' begs a consideration of costs." *Id.* at 677. Much like the term "minimize" in *Entergy*, "significant" is a word that "admits of degree." *Cf.* 556 U.S. at 219. There is no clear numerical threshold or percentage increase at which the tons of emissions contributed suddenly and obviously become "significant." Rather, the word has no singular definition, and this Court has ruled that ambiguous terms, like "best," can reasonably be

interpreted to mean the lowest cost. *Cf. id.* at 218. As the D.C. Circuit had repeatedly found in prior cases, where a "mandate directed to some environmental benefits is phrased in general quantitative terms ('ample margin of safety,' 'substantial restoration,' and 'major'), and contains not a word alluding to non-health trade-offs[,] . . . the agency [i]s free to consider the costs of demanding higher levels of environmental benefit." *Michigan*, 213 F.3d at 679 (citing *Natural Res. Def. Council v. EPA*, 824 F.2d 1146, 1163 (D.C. Cir. 1987); *Grand Canyon Air Tour Coal. v. FAA*, 154 F.3d 455, 475 (D.C. Cir. 1998); and *Natural Res. Def. Council v. EPA*, 937 F.2d 641, 643-46 (D.C. Cir. 1991)); *see also George E. Warren Corp. v. EPA*, 159 F.3d 616, 623-24 (D.C. Cir. 1998) (holding that EPA's consideration of factors other than air quality, such as the price and supply of gasoline, was permissible under the anti-dumping provisions of the reformulated gasoline program established by the 1990 Clean Air Act Amendments); *cf. Int'l Bhd. of Teamsters v. United States*, 735 F.2d 1525, 1528-29 (D.C. Cir. 1984) (construing mandate to adopt "reasonable requirements" for safety as allowing consideration of cost).

C. The D.C. Circuit Majority Below Substituted Its Own Policy Judgment to Set Aside the Agency's Reasonable Interpretation

While acknowledging that EPA has "significant discretion to implement the good neighbor provision," the D.C. Circuit majority below contends that the statute's text and previous circuit decisions in the *Michigan* and *North Carolina* cases "establish several red lines" that limit how EPA may reasonably interpret the requirements. *EME Homer*

City Generation, 696 F.3d at 19. However, neither text nor previous circuit precedent (nor, indeed, statutory structure nor history) actually mandates the limitations on implementing the Good Neighbor Provision that the majority below imagines. Even if the majority's readings of the text are permissible, they are not the only legitimate interpretations, and they should not trump the agency's own reasonable views on the statute.

For example, the majority asserts that EPA may not consider the cost-effectiveness of pollution controls in ways that violate the statute's purported "proportionality requirement." *Id.* at 26. Under this supposed statutory requirement, the allocation of emissions allowances between states must be proportional to their contributions to a downwind states' nonattainment. *Id.* at 21. The D.C. Circuit created this interpretation based upon its own policy judgment; proportionality is not required by the statutory text and runs contrary to prior D.C. Circuit precedent. As noted above, the *Michigan* court held, "there is nothing in the text, structure, or history of [the Good Neighbor Provision] that bars EPA from considering cost in its application." *Michigan*, 213 F.3d at 679. Moreover, the court observed that allocating reduction requirements solely on the basis of air quality impacts, without considering costs, would vitiate the efficient emissions trading system and would be a result "as extreme as it sounds." 213 F.3d at 676. It further puzzled over how the statutory text could possibly be interpreted to "exclude cost but admit equity." *Id.* at 678. A cost-blind proportionality requirement is also "at odds with *North Carolina* where the court concluded that EPA's measure of significant contribution need not

'directly correlate with each State's individualized air quality impact on downwind nonattainment *relative to other upwind states.*'" *EME Homer City Generation*, 696 F.3d at 59 (Rogers, J., dissenting) (quoting *North Carolina v. EPA*, 531 F.3d 896, 908 (D.C. Cir. 2008) (emphasis added)).

Moreover, the majority below does not address whether its interpretation is practicable. For instance, it fails to explain how proportionality can be determined when multiple upwind states' emissions intermingle and affect multiple downwind states. An upwind state will contribute different proportions of emissions to different downwind states and, therefore, allocating emissions by proportional impact on downwind states would not be feasible.

In short, neither text nor precedent, nor structure nor history imposes a cost-blind "proportionality requirement" on implementation of the Good Neighbor Provision. Congress never required proportionality. Rather, the D.C. Circuit's preference for proportionality is only one possible interpretation of the text. But another possible—and much more reasonable—interpretation of the text is the cost-effectiveness framework applied by EPA. The majority below should not have substituted its own policy judgment for that of the agency.

D. Best Regulatory Practices Confirm That the Cost-Effectiveness Framework Is Not Just Permissible and Reasonable, but Also a Prudent Interpretation of the Good Neighbor Provision

As explored above, Congress has never prohibited using a cost-effectiveness framework to implement the Good Neighbor Provision. Moreover, in light of statutory context and legislative history supporting the minimization of costs through tools like market mechanisms, the cost-effectiveness framework is a reasonable interpretation of any ambiguity in the Good Neighbor Provision. Under *Chevron*, the Court's inquiry should end there: agencies have discretion to adopt permissible and reasonable interpretations, even if they are not necessarily the best policy choices. Still, it is telling that the cost-effectiveness framework, in addition to being permissible and reasonable, is consistent with the administration's broader regulatory goals and best rulemaking practices.

The pursuit of cost-effective regulatory strategies and the use of market mechanisms to minimize costs are required by executive order where not prohibited by statute. Specifically, executive orders instruct federal agencies to "assess both the costs and the benefits of the intended regulation" and "design its regulations in the most cost-effective manner to achieve the regulatory objective," giving due consideration to the advantages of using "economic incentives" like "marketable permits." Exec. Order No. 12,866 §§ 1(b)(3)-(6) & 9, 58 Fed. Reg. 51,735, 51,736, 51,744 (Oct. 4, 1993); *see also* Exec. Order No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 21,

2011). Since the Clean Air Act does not prohibit the consideration of costs in implementing the Good Neighbor Provision, the clear presidential preference for cost-effective, incentive-based regulations makes EPA's interpretation a reasonable and prudent one.

In designing the Transport Rule, EPA drew on its decades of experience implementing such economically and scientifically complex interstate air pollution programs. EPA, in partnership with the states, oversees countless environmental programs that all compete for resources. In such circumstances, it is essential to consider and minimize the costs of achieving the desired targets for environmental quality. Cost-effectiveness is all the more critical "in an age of limited resources available to deal with grave environmental problems, where too much wasteful expenditure devoted to one problem may well mean considerably fewer resources available to deal effectively with other (perhaps more serious) problems." *Entergy*, 556 U.S. at 233 (Breyer, J., concurring and dissenting). Moreover, since the Transport Rule addresses only the allocation of responsibility for emissions reductions, not the ambient air quality standards that must be satisfied, it makes little sense to create a compliance framework that results in paying more to achieve a result that could be achieved more cheaply.

CONCLUSION

For the foregoing reasons, the Court should reverse and remand the D.C. Circuit's decision in this case.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Nos. 12-1182, 12-1183

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In The
Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., et al.,

Respondents.

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

EME HOMER CITY GENERATION, L.P., et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

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INTRODUCTION AND INTEREST OF THE AMICI CURIAE STATEMENT[1]

Amici Curiae are law professors who research, teach, and write on federal environmental and administrative law. They are concerned in this case by the majority's conclusion below that issues related to the interpretation of ambiguous statutory language could be reached even though they were never raised during the rulemaking process. This conclusion is contrary to the clear language of the issue exhaustion requirement articulated in Section 307(d)(7)(B) of the Clean Air Act and contrary to proper role of reviewing courts under *Chevron*. As a result, it could have far-reaching impacts for a wide array of administrative cases and agencies and should be corrected by the Court. More information about the specific interest of each professor is provided below.

Todd Aagaard is an Associate Professor at the Villanova University School of Law. His teaching and research focuses on environmental law and administrative law.

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[1] In accordance with Supreme Court Rule 37.6, Amici Curiae certify that no counsel for any party in this case authored this brief in whole or in part, and furthermore, that no person or entity, other than Amici Curiae, has made a monetary contribution specifically for the preparation or submission of this brief. The parties' consent to the filing of this brief was filed with the Clerk of this Court.

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STATEMENT

The federal government typically issues between 600 to 800 notices of proposed rulemakings per year that involve everything from catch limits for the Hawaiian islands, http://www.regulations.gov/#!documentDetail;D=NOAA-NMFS-2013-0103-0001, to proposals to prohibit window covering cords, http://www.regulations.gov/#!documentDetail;D=CPSC-2013-0028-0001, to removing the gray wolf from the endangered species list, http://www.regulations.gov/#!documentDetail;D=FWS-HQ-ES-2013-0073-0001. As one commentator has noted, "[t]he volume and breadth of social and economic policymaking undertaken by the federal government on our behalf is breathtaking." Cynthia R. Farina, *False Comfort and Impossible*

Promises: Uncertainty, Information Overload, and the Unitary Executive, 12 U. PA. J. CONST. L. 357, 361 (2010). When a case implicates the basic rules governing proposed rulemakings, it has the potential to have broad, often unanticipated consequences, and therefore deserves the attention of this Court.

The present case involves one such rulemaking. The Cross-State Air Pollution Rule, also known as the Transport Rule, implements the good neighbor provision that was extended to state planning by the 1990 revisions to the Clean Air Act. That provision provides that a State Implementation Plan (SIP):

> contain adequate provisions . . . prohibiting . . . any source or other type of emissions activity within the State from emitting any air pollutant in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State with respect to any such national primary or secondary ambient air quality standard. . . .

42 U.S.C. § 7410(a)(2)(D) (2013). The Transport Rule sets emissions reduction responsibilities for 27 upwind States based on their contributions to downwind States' air quality problems. The methodology for defining "significant contribution" in this context is at the heart of this case.

As is often the case, the Transport Rule rulemaking was not the first go-around at the issue for the Environmental Protection Agency (EPA). In 1998, the EPA promulgated the NOx SIP Call, which required

NOx reductions for states contributing to ozone nonattainment in downwind states. 63 Fed. Reg. 57,356 (Oct. 27, 1998). That rule was largely upheld in *Michigan v. EPA*, 213 F.3d 663 (2000). In 2005, the agency issued the Clean Air Interstate Rule (CAIR), which was later vacated in 2008. *See North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008). In response to concerns expressed in *North Carolina*, the EPA significantly revised the substance of CAIR, resulting in the new Transport Rule. In the case below, ***EME Homer City Generation v. EPA***, 696 F.3d 7 (D.C. Cir. 2012), the D.C. Circuit vacated the Transport Rule after concluding that the EPA had improperly determined which states would "contribute significantly" to downwind air pollution problems.

None of the briefs supporting the many petitions for review below, nor the majority opinion for the D.C. Circuit reviewing the Transport Rule, cite to anything in the rulemaking docket that challenges the EPA's statutory interpretation of "significant contribution." Instead, the majority relied on the CAIR proceedings several years ago to suggest the EPA knew that parties objected to its statutory interpretation in the revamped Transport Rule.

SUMMARY OF ARGUMENT

Clean Air Act (CAA) Section 307(d)(7)(B), 42 U.S.C. § 7607(d)(7)(B), requires that "[o]nly an objection to a rule or procedure which was raised with

reasonable specificity during the period for public comment . . . may be raised during judicial review." In this case, no such objection was made with respect to the EPA's significant contribution analysis, an approach that was detailed over many pages in the proposed rulemaking. By deciding an issue that was not raised during the rulemaking process, the court of appeals exceeded its jurisdiction. This conclusion is dictated not only by the CAA statute, but is also required as a matter of appropriate judicial review and as a matter of basic fairness to the parties.

ARGUMENT

I. ISSUE EXHAUSTION SAFEGUARDS JUDICIAL ECONOMY AND ADMINISTRATIVE AUTONOMY.

This Court has long held that "[s]imple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice." *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). More recently, in *Sims v. Apfel*, the Court again reiterated that a petitioner may not object in court to an administrative action when a statute requires that objections first be presented to the agency. 530 U.S. 103, 107-08 (2000) (holding that a Social Security claimant need not raise issues during internal agency appeals

because, among other things, no rule or statute required it but also noting that "[a]lthough the question is not before us, we think it likely that the Commissioner could adopt a regulation that did require issue exhaustion.").

The underlying purposes of administrative exhaustion doctrines are well understood. Exhaustion serves the "twin purposes of protecting administrative agency authority and promoting judicial efficiency." *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992); *see also McKart v. United States*, 395 U.S. 185, 193-95 (1969) (recognizing that consistent enforcement of exhaustion requirements is supported by both respect for agency autonomy and by concern for judicial efficiency); *Weinberger v. Salfi*, 422 U.S. 749, 765 (1975) ("Exhaustion is generally required as a matter of preventing premature interference with agency processes, so that the agency may function efficiently and so that it may have an opportunity to correct its own errors, to afford the parties and the courts the benefit of its experience and expertise, and to compile a record which is adequate for judicial review.").

Allowing agencies the first opportunity to respond to challenges supports judicial economy in at least two ways. First, agencies can resolve challenges and eliminate the need for judicial review. In *McKart v. United States*, this Court observed that the "complaining party may be successful in vindicating his rights in the administrative process. If he is required to pursue his administrative remedies, the courts may never have to intervene." 395 U.S. at 195; *see*

also McCarthy, 503 U.S. at 145 (exhaustion promotes judicial efficiency because "[w]hen an agency has the opportunity to correct its own errors, a judicial controversy may well be mooted.").

Even if the need for judicial review is not eliminated, allowing the agency an opportunity to respond to challenges generates a more complete factual record. *See McKart*, 395 U.S. at 194 ("[I]t is normally desirable to let the agency develop the necessary factual background upon which decisions should be based."). A fully developed factual record is particularly important where disputes involve complex issues within the special competence of the expert agencies. In that way, "[p]ractical considerations arising out of the agency's familiarity with the subject matter as well as institutional considerations caution strongly against courts' deciding ordinary, circumstance-specific matters that the parties have not raised before the agency." *Sims*, 530 U.S. at 116 (Breyer, J., dissenting).

Providing agencies the first opportunity to respond to rulemaking challenges also respects administrative autonomy, and is especially important where Congress has expressly provided an exhaustion requirement by statute. Indeed, this Court has acknowledged that the "requirements of administrative issue exhaustion are largely creatures of statute," *Sims*, 530 U.S. at 107, and that congressional intent is of "paramount importance to any exhaustion inquiry," *McCarthy*, 503 U.S. at 144 (internal quotation marks omitted). Most importantly, "where Congress

specifically mandates, exhaustion is required." *Id. Cf. Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665 (1982) (holding that the Court of Appeals lacked jurisdiction to review objections not raised before the agency because a statute provided that "[n]o objection that has not been urged before the Board . . . shall be considered by the court."); *Federal Power Comm'n v. Colorado Interstate Gas Co.*, 348 U.S. 492, 497-98 (1955) ("[T]he court is . . . expressly precluded from considering an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved.").

In those cases, like this one, in which a specific exhaustion requirement exists, the next question is whether Congress intended the exhaustion requirement to apply to a particular situation. That question is easily answered here because the statutory exhaustion requirement expressly applies to rulemakings like the one at issue here. In particular, the Clean Air Act provides that "[o]nly an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment . . . may be raised during judicial review." 42 U.S.C. § 7607(d)(7)(B). The fact that the CAA expressly requires issue exhaustion in rulemakings like this one separates this case from those like *Sims* that have no such broad requirement. Indeed, complex problems like interstate air pollution transport are precisely the sort that Congress sought to give the EPA first crack at resolving. Invoking exhaustion to

give the EPA an opportunity to manage these complex problems in the first instance is also in line with this Court's observations.

The starting point of this analysis, therefore, is clear. If the challengers to the Transport Rule decided not to raise certain issues during the notice and comment rulemaking procedure, the D.C. Circuit should not have reviewed those issues. To do otherwise thwarts the express intent of Congress and the general principles underlying the issue exhaustion requirement. *Cf. Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action.").

II. THE CLEAN AIR ACT'S ISSUE EXHAUSTION REQUIREMENT REQUIRES THAT AN AGENCY HAVE ADEQUATE NOTICE.

To say that the issue exhaustion requirement applies to judicial review of Clean Air Act petitions does not fully answer the question. The Clean Air Act provides that litigants raise issues before the agency with "reasonable specificity." 42 U.S.C. § 7607(d)(7)(B). On its own, this phrase sets no particular standard but rather relies on a test of reasonableness. Logically, then, whether a litigant raised an issue with adequate specificity would turn on the

underlying purposes of the exhaustion requirement as well as the specific context in which the issue arises. Here, the question is whether an issue is raised with sufficient specificity to put the EPA on notice of the challenges lodged against its proposed rulemaking. Notice, after all, is the ultimate touchstone of whether an agency had a meaningful opportunity to address and resolve the later-raised challenge. *See, e.g., Texas Mun. Power Agency v. EPA*, 89 F.3d 858, 871 (D.C. Cir. 1996) (declining to review challenges when the petitioner "has not demonstrated that it ever brought this specific complaint to the attention of the agency during an appropriate comment period"); *Natural Resources Def. Council v. Thomas*, 805 F.2d 410, 427 (D.C. Cir. 1986) (holding that "[a]lthough we think it worthy of the EPA's attention, we ultimately do not decide this difficult issue of statutory interpretation, for it appears no party raised it during the rulemaking's comment period, as required by the Act.").

Here, the Court would give due respect to the Clean Air Act's statutory language, serve the core functions of the exhaustion doctrine, and recognize broader considerations of justice if it judged "reasonable specificity" by considering whether the EPA was properly notified of the statutory challenge that industry petitioners raised for the first time on judicial review. Indeed, the D.C. Circuit's own interpretation of the Clean Air Act's issue exhaustion requirement in prior cases bars judicial review when adequate notice has not been provided. *See, e.g.*,

Mossville Envtl. Action Now v. EPA, 370 F.3d 1232, 1238 (D.C. Cir. 2004) ("Reasonable specificity requires something more than a general challenge to EPA's approach." (internal quotation marks omitted)). In particular, drawing on waiver in the litigation context, the D.C. Circuit has announced that "although we allow commenters 'some leeway in developing their argument before this court,' the comment must have provided 'adequate notification of the general substance of the complaint.'" *Natural Resources Def. Council v. EPA*, 571 F.3d 1245, 1259 (D.C. Cir. 2009) (quoting *South Coast Air Quality Mgmt. Dist. v. EPA*, 472 F.3d 882, 891 (D.C. Cir. 2006)). The D.C. Circuit has thus struck the balance between providing notice and the specificity required for that notice.

Important to considerations of fairness, the reasonable specificity requirement articulated by the CAA is consistent with notice requirements for all participants in the rulemaking process. The D.C. Circuit itself has long held that agencies must provide adequate notice to parties of its actions and decisions. For example, the D.C. Circuit has embraced the logical outgrowth test to determine whether an agency has provided adequate notice of a final rule. *See City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) ("'Under the "logical outgrowth" test . . . , the key question is whether commenters "should have anticipated" that EPA might' issue the final rule it did." (citations omitted)). The same court also recently discounted an addition made by the EPA

too late in a Clean Air Act rulemaking proceeding to be meaningful:

> A purpose of notice-and-comment provisions under the APA (and presumably of the more elaborate procedural safeguards in § 307 of the Clean Air Act) is "to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is likely to give real consideration to alternative ideas." *New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1980). By waiting until the petition for reconsideration to respond to a comment that had been raised during the comment period, EPA deprives the affected party of the opportunity to respond to EPA's rationale and influence agency action at an earlier stage. Thus, just as we will not entertain an argument raised for the first time in a reply brief to prevent sandbagging of appellees and respondents, we are reluctant to affirm based on a factual assertion raised for the first time in an agency's denial of a petition for reconsideration when the agency had an opportunity to raise that point at an earlier point in the rulemaking process. *See Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011).

National Ass'n of Clean Water Agencies v. EPA, 2013 WL 4417438, *31 (August 20, 2013). These requirements illustrate that the principles of simple fairness have informed the administrative processes on all

sides, and reasonable notice is one of its basic requirements.

The problem in this particular case is that the D.C. Circuit failed to follow the requirements of the statute. It also did not adhere to its own standards. As a result, the court thwarted congressional intent and created the very problems that exhaustion doctrines were meant to avoid.

III. APPLYING THE ISSUE EXHAUSTION REQUIREMENT AS MANDATED BY THE CAA IS ALSO CONSISTENT WITH COMMON LAW.

The CAA's approach to the issue exhaustion requirement is consistent with the broader common law application of exhaustion doctrines by this Court and others. To that end, more than forty years ago this Court recognized the case-specific nature of the exhaustion inquiry and the importance of considering the underlying purpose of the doctrine:

> The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved.

McKart, 395 U.S. at 193.

In *McCarthy*, this Court recognized several exceptions to the exhaustion doctrine for cases where

there was no specific congressional mandate. *See* 503 U.S. at 146-50. Those exceptions include situations in which requiring parties to engage the administrative process before seeking judicial review would result in undue prejudice (e.g., where there would be unreasonable delay or plaintiff would suffer irreparable harm without immediate judicial review); where there is some doubt as to the agency's institutional competence to resolve the issue raised (e.g., there is a challenge to the constitutionality of the underlying statute or the agency's own procedures); or where the agency is shown to be biased or otherwise predetermined the issues before it. *See id.*

While the common law exceptions demonstrate a certain case-specific and flexible approach to the exhaustion requirement, none of those exceptions apply here, where Congress has required issue exhaustion as a condition of judicial review under the Clean Air Act. *Cf. McCarthy*, 503 U.S. at 152 (evaluating the individual and institutional interests at stake in the case "[b]ecause Congress has not *required* exhaustion of a federal prisoner's *Bivens* claim."). Even if they did apply, as a matter of substance, none of the exceptions fit this case.

It might be suggested that, because the court below viewed the agency as exceeding its statutory authority, the CAA's provision requiring any issue in a rulemaking to be raised with "reasonable specificity" may not apply. First, the language of § 7607(d)(7) admits of no such exception and the D.C. Circuit has never before interpreted it to make such an exception.

Natural Resources Def. Council v. Thomas, 805 F.2d 410, 427 (D.C. Cir. 1986) (applying exhaustion requirement to statutory interpretation issues). Moreover, creating such an exception for this case misunderstands the nature of the statutory question at hand. This is not the rare case in which the agency has profoundly erred with respect to the statutory scheme it administers and no commenter raised the issue. Instead, the majority opinion's objections to the EPA's actions turn on questions of the reasonable interpretation of the statute. In such circumstances, the court is not authorized to substitute "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837, 843 n.11 (1983). Instead, the court only engages in limited review of the agency's action: "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Accordingly, it makes little sense to review an interpretation that has never been presented to the agency for its consideration and full explanation. This kind of statutory interpretation question – one that is left unanswered by Congress and one whose reasonableness turns on facts within the special competency of the agency – is precisely the kind that would benefit from the principles underlying the exhaustion doctrine. In particular, judging the reasonableness of an agency's interpretation in this case would have been aided by giving the agency an opportunity to explain how its interpretation best reconciles the language of

the statute with the practical difficulties of resolving interstate air transport problems.

IV. THE RESPONDENTS' STATUTORY CHALLENGE TO THE TRANSPORT RULE IS BARRED BY THE ISSUE EXHAUSTION REQUIREMENT.

Though some flexibility is inherent in the Clean Air Act's exhaustion requirement, and in the exhaustion doctrines as applied at common law, the doctrine must pay more than mere lip service to judicial economy, administrative autonomy, and congressional intent. Here, this case is not a close one and the D.C. Circuit's application is tantamount to rejecting the Clean Air Act's issue exhaustion requirement entirely. *Cf. EME Homer City Generation v. EPA*, 696 F.3d 7, 52 (D.C. Cir. 2012) (Rogers, J., dissenting) ("The jurisdictional question is not *close*; the court's efforts to avoid this court's well-settled precedent fails clearly.").

There are three particularly troubling aspects of the D.C. Circuit's application of the issue exhaustion doctrine in this case. First, the court concluded that the exhaustion requirement was met not because the *litigants* had raised their objections to the agency, but because the *court* had commented on the bounds of statutory authority in its previous review of earlier rulemakings. In other words, the court's own concerns about statutory authority were used to satisfy the exhaustion requirement, not objections made by

interested parties to the rulemaking at hand. Second, to satisfy the exhaustion requirement for the Transport Rule, the court allowed litigants to rely on objections made during previous rulemakings, at points earlier in the regulatory history of the agency's attempts to resolve interstate air pollution problems. But it is precisely the long regulatory history and the industry challengers' previous objections on similar issues that suggest their silence in response to the Transport Rule would reasonably have been interpreted by the EPA as a concession of authority. Finally, the court's review of the issue would have benefitted from the agency's analysis in the first instance.

A. The Issue Exhaustion Requirement Is Not Met By Relying on Language in Court Decisions Reviewing Previous Versions of the Challenged Rule.

In arguing that the issue exhaustion requirement was met, the majority opinion relies on its previous decision in *North Carolina v. EPA*, 531 F.3d 896 (D.C. Cir. 2008), where the court reviewed and vacated the 2005 CAIR, the predecessor to the Transport Rule.

In *North Carolina*, the D.C. Circuit suggested that the EPA would exceed the statutory authority of the good neighbor provision if it required upwind states to reduce their emissions beyond the portion that significantly contributes to downwind nonattainment. Based on the admonishments in *North*

Carolina, the majority concluded that the EPA should have had notice that its later-crafted Transport Rule exceeded the statutory authority of the good neighbor provision.

If the *North Carolina* decision was as clear as the majority argues, it stands to reason that some commenters would have raised an objection to the EPA's statutory authority in response to the proposed Transport Rule. The fact that no commenter read the *North Carolina* decision to obviously reject the approach that the EPA later embraced in the Transport Rule demonstrates one of two things. First, that the opinion could not fairly be said to put the EPA on notice that an approach like that taken in the Transport Rule would violate the statute. Or, second, none of the very interested and motivated challengers believed that the EPA exceeded its authority despite the admonishment of the court in *North Carolina*. Either way, the *North Carolina* decision cannot be bootstrapped to put the EPA on notice that the Transport Rule exceeds the bounds of the good neighbor provision.

As Judge Rogers explained in dissent, another problem with the majority's argument is that the statutory challenge raised for the first time on judicial review of the Transport Rule was not even one of the issues litigated in *North Carolina*. *See EME Homer City v. EPA*, 696 F.3d at 39-40 (Rogers, J., dissenting). In other words, while some commenters objected to the 2005 CAIR on the theory that it exceeded statutory authority of the good neighbor

provision, no commenters pursued that objection during judicial review of the 2005 CAIR. Then, after the *North Carolina* decision, no commenters raised the statutory authority argument in response to the proposed Transport Rule. As a result, the EPA has no obligation to respond to an objection that was unlitigated in response to CAIR and not raised in response to the Transport Rule.

This highlights an even more fundamental question, which is whether general and prospective admonishments made by a court in its response to one agency rule can even be treated as comments to a subsequently proposed agency rulemaking. This would mean that a litigant would satisfy the Clean Air Act's issue exhaustion requirement by assembling the relevant jurisprudence and arguing that the agency should have understood the precise bounds of its statutory authority; no further action would be necessary during rulemaking to notify the agency that it exceeded its authority in a particular proposed rule. Such an end-around the exhaustion requirement cuts against both the plain language of Section 307(d)(7)(B) and the goal of increasing transparency between the agency and commenters so that issues can be resolved or further developed during the administrative process.

In creating this end-around, the majority fundamentally conflated a statutory issue raised by the *court* in response to CAIR with issues raised by the *industry challengers* in their comments to the

Transport Rule now under challenge. This Court should not make a similar mistake.

B. Comments Made in a Previous Rulemaking Cannot Be Automatically Bootstrapped and Assumed to Apply to the Challenged Rule.

Just as the court below assumed that the exhaustion requirement could be met by bootstrapping issues raised by the court in its review of CAIR, the court similarly assumes that objections raised by commenters to the 2005 CAIR can be automatically renewed with respect to the 2011 Transport Rule. *See EME Homer City*, 696 F.3d at 39-40 (Rogers, J., dissenting) (explaining that the comments offered by the majority to support its review were comments made during the administrative proceedings of CAIR, which were not incorporated into the Transport Rule's administrative proceeding). By this logic, in cases where there is a long regulatory history and several iterations of a rule have been previously litigated, vacated, and revisited, the agency would have to assume that all previous objections remain live in the later revised rules. All objections made at any point in the regulatory history would automatically be carried forward without further action by the litigants.

This simply cannot be. Administrative rulemaking would be severely hampered and slowed, more so than it already is, if an agency were burdened with

reading the tea leaves of an entire regulatory history and compelled to assume that previous objections were automatically renewed. A better approach, and the one that clearly fits with the statutory language, is to require challengers to raise with reasonable specificity their objections to each rule. Of course, this could be done quite simply by cross-referencing previous objections. It must, however, be done. Basic communication dictates this be so.

Common sense also dictates that if an objection raised early on in a rule's regulatory history is not expressly renewed in subsequent stages, the commenter has decided the objection is not viable or otherwise not strategically worth pursuing. Here, the decision not to raise a statutory challenge in response to the Transport Rule is particularly troubling. Recall that the litigants had raised the issue in comments to CAIR and did not raise it here. The litigants' silence in this case, therefore, bears special meaning and suggests the issue of statutory authority had been resolved.

Embracing an approach under which an objection is presumed dead unless expressly renewed allows judicial review to work most efficiently with administrative rulemaking. At each stage in the review and with each new version of a rule, the agency can be assured that it has sufficiently satisfied the concerns of the courts and commenters if earlier raised objections are not subsequently renewed. This system, moreover, places no special burden on the commenters. It merely requires them to become familiar with

the regulatory history of a rulemaking and raise previous objections again if those objections remain valid. In the end, the basic rule of issue exhaustion articulated by the statute allows the rulemaking process in the more complex cases like this one to move forward, culling the issues and bringing increased clarity with each rulemaking attempt.

C. Interstate Air Transport Raises the Kind of Complex Problems That Would Benefit From Agency Review in the First Instance.

The reason for requiring exhaustion is particularly clear where, as here, complex problems within the special competency of the agency would have benefitted from the agency's response to the late-raised issues. *See McCarthy*, 503 U.S. at 145 ("Exhaustion concerns apply with particular force when the action under review involves exercise of the agency's discretionary power or when the agency proceedings in question allow the agency to apply its special expertise."). The sheer size of this particular rulemaking – which includes tens of thousands of comments and a 3000-page Primary Response to Comments (*see* EPA, Transport Rule Primary Response to Comments (June 2011), Docket No. EPA-HQ-OAR-2009-0491-4513, available at http://www.regulations.gov/#!documentDetail;D=EPA-HQOAR-2009-0491-4513) – illustrates just how complex and difficult this rulemaking was. It is also no secret that interstate air pollution transport raises complex technical and

policy questions wrapped up in issues of public health, cost, and feasibility. *See* Petr. EPA Br. at 46-55.

Consider for instance the not-so-simple problem of determining which states are upwind states contributing to downwind nonattainment and which states are downwind states that are unwitting recipients of upwind pollution. In a modeling map produced by the EPA to explain its proposed Transport Rule, Texas is an upwind contributor of ozone to Louisiana. *See* EPA, Proposed Air Pollution Transport Rule, Slideshow Presentation, at slide 35, available at http://www.epa.gov/airquality/transport/pdfs/TRPresentationfinal_7-26_webversion.pdf. At the same time Texas is a downwind recipient of ozone from Oklahoma, Kansas, Arkansas, Illinois, Florida, and some states as far away as the Northeast. *Id.* Louisiana, in turn, is also downwind from the ozone emitted by Arkansas, Mississippi, and Georgia. *Id.* So which states are responsible for nonattainment in Louisiana? How much, for instance, should Texas be held responsible when it is also an unwitting downwind recipient of ozone? And this is just the complexity of figuring out who is doing what damage, never mind the public health and science determinations of what portion of emissions constitute excess or significant contributions.

Congress recognized the importance of addressing interstate air pollution when it included the good neighbor provision, 42 U.S.C. § 7410(a)(2)(D) (2013). But it also recognized the complex task of regulating

intermingled air pollution when it amended the good neighbor provision in 1990 to expand EPA's authority. Namely, the 1990 amendments permit regulation of upwind states that "significantly contribute" to downwind nonattainment, rather than requiring a stronger causal link wherein the upwind states "prevent" downwind nonattainment. *Compare* 42 U.S.C. § 7410(a)(2)(E) (1988) (requiring regulation of upwind states that would "prevent attainment" in a downwind State) *with* 42 U.S.C. § 7410(a)(2)(D) (2013) (requiring SIPs to regulate emissions that "contribute significantly" to nonattainment in downwind States). In this way, Congress expanded the EPA's regulatory authority to regulate upwind states that contribute to downwind nonattainment in combination with other states. *See EME Homer City*, 696 F.3d at 21 n.14 (explaining the statutory history of the good neighbor provision and noting the expanded authority). The point is simply that Congress already amended the good neighbor provision once in recognition that the issues are more complicated than superficial consideration would dictate.

In cases such as these, courts are less equipped to pass on the particular statutory bounds or to draw precise "red lines" when the record remains undeveloped on whether the court's contours are compatible with the technical and political realities that complicate the statutory mandate. Accordingly, this was a particularly bad context for the court to ignore the statutory exhaustion requirement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
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BRIEFS

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Nos. 12-1182 and 12-1183

In the Supreme Court of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

AMERICAN LUNG ASSOCIATION, ET AL., PETITIONERS

v.

EME HOMER CITY GENERATION, L.P., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 8 OTHER STATES IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Through its provisions governing "state implementation plans" ("SIPs"), the Clean Air Act gives States the first opportunity to satisfy, consistent with their unique regulatory agendas, the bottom-line air-quality obligations that EPA mandates. 42 U.S.C. § 7410(a). If the States fail to satisfy those obligations and certain other conditions are met, EPA may promulgate "federal implementation plans" ("FIPs"), which serve as federal backstops to satisfy EPA requirements that the States could have satisfied, but did not satisfy, in SIPs. *Id.* § 7410(c)(1). In the rule at issue here (the "Transport Rule," 76 Fed. Reg. 48,208 (Aug. 8, 2011) (Pet. App. 117a)), EPA defined a new region of 27 upwind States and announced new obligations for those States to mitigate interstate transport of air pollution under the Act's "good neighbor" provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I). But instead of giving the Transport Rule States a chance to satisfy those new obligations through SIPs, EPA immediately imposed FIPs on all of them.

The questions presented are:

1. Whether the court of appeals had jurisdiction to consider the challenges to the Transport Rule.

2. Whether the court of appeals correctly vacated the Transport Rule for imposing FIPs to implement obligations that EPA had not previously announced.

3. Whether the court of appeals correctly vacated the Transport Rule for exceeding the substantive limits of the good-neighbor provision.

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DEFINITIONS

CAIR	Clean Air Interstate Rule (CAIR), 70 Fed. Reg. 25,162, 25,167 (May 12, 2005).
EPA	United States Environmental Protection Agency
IPM	Integrated Planning Model
FIP	Federal Implementation Plan
JA	Joint Appendix
NAAQS	National Ambient Air Quality Standards
NEEDS	National Electric Energy Data System
RPO	Regional Planning Organization
SIP	State Implementation Plan
Transport Rule	Cross-State Air Pollution Rule, 76 Fed. Reg. 48,208 (Aug. 8, 2011), Pet. App. 117a–1458a.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Amici States address a critical issue within the second question presented: EPA's attempt to usurp the States by imposing federal implementation plans before the States had an opportunity to develop state plans. This power grab by the agency relies on a significant distortion of the Clean Air Act and contravenes the agency's own longstanding pronouncements. EPA argues that the States waived their right to submit state plans by waiting for the agency to quantify each State's good-neighbor obligations. Despite having pledged since 1998 to undertake that task itself, the agency now contends that the States should have determined those obligations themselves and developed state plans accordingly. Because the States did not do so, EPA asserts, it was permitted to immediately impose federal plans on the States.

This brief shows that the agency's novel view of the Clean Air Act is fundamentally at odds with the Act's cooperative federalism, as it would enable EPA to shut out the States entirely. The States are set up to fail. The task of quantifying each State's good-neighbor obligations, while well suited to EPA, is too complicated and expensive for the States to complete. And even if the impossible were accomplished, EPA claims the right to reject whatever the States did.

Amici States—which include States covered by the Transport Rule and States outside the rule—submit this brief because all States have reason to be concerned about the broader threat posed by EPA's

position in this case.[1] Congress expressly reserved to state and local governments the primary responsibility for controlling air pollution at its source, recognizing the value of local experience and flexibility. EPA's unprecedented assault on this principle in the Transport Rule portends a new approach by the agency to the relationship between state and federal implementation plans. If EPA prevails, all States are likely to find the agency aggressively imposing federal implementation plans on the theory that the States waived their right to submit state plans. *Amici* States urge this Court to prevent the agency from unilaterally and fundamentally transforming the Clean Air Act.

SUMMARY OF ARGUMENT

This case concerns an attempt by EPA to take over the States' role in the Clean Air Act. In the Act, Congress adopted a cooperative federalism structure—where the States and the federal government each play a specific part. EPA's job is to use federal resources to identify air pollution problems and set goals for cleaner air. The States' job is to achieve those goals while working through local problems and conditions.

State leadership in implementation is where cooperative federalism yields real benefits. State-level implementation ensures that local circumstances and needs are not lost in the press to meet national air quality standards. States can structure air pollution cuts to encourage local energy sources, reward efficient energy producers, or address state economic problems.

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[1] The Transport Rule covers *amici* Arkansas, Kentucky, Missouri, and West Virginia. *Amici* Arizona, Montana, North Dakota, South Dakota, and Wyoming are outside of the rule.

For this reason, Congress gave the States wide discretion in developing implementation plans and sharply limited EPA's ability to reject proposed state implementation plans.

In the Transport Rule, EPA has turned this structure on its head and departed from its own longstanding view of the Act. According to the agency, it was the *States'* job to quantify the amount of cross-state air pollution in each State. And because the States failed to do so, *EPA* now has the right to take the lead on implementation and impose a federal plan.

As explained more fully below, EPA's novel theory is not only backwards, but an attempt to shut out the States entirely. *First*, it is impossible for the States to quantify cross-state air pollution for regional pollutants. The effort would require a massive and unprecedented multi-state collaboration, necessitating the cooperation of at least thirty States with competing interests, as well as significant money, expertise, and technology. In addition, according to EPA, the States would have to complete the task in just three short years—much faster than EPA's own efforts in this case. These obstacles—jointly and severally—prevent the States from being able to quantify cross-state air pollution for regional pollutants.

Second, even if the States could pull off the impossible, EPA claims to have an effectively unlimited veto over the States' conclusions. The parties supporting EPA contend that EPA has the right to reject a proposed state plan if the agency disagrees in any way with the States' quantification efforts. That is a sweeping assertion of authority, given the vast number of technical and legal judgment

calls the States would have had to make. All of these decisions give EPA virtually unlimited ability to disagree with the States and to render meaningless any effort and expense.

The judgment of the court of appeals should be affirmed.

ARGUMENT

Cooperative federalism under the Clean Air Act is in some ways like baseball. In baseball, the batter stands ready to hit the ball as soon as the pitcher throws it to him. And the batter always has the chance to take at least one swing before he's out. The Clean Air Act is similar. The States stand ready to respond as soon as EPA decides how much pollution to cut. And the States always have a reasonable time to make their own unique plans for cutting that much pollution before EPA gets a turn.

Now imagine if EPA pitched the way it handled the Transport Rule. EPA would be like a pitcher who stops pitching and simply decides it's his turn to bat. The batter has lost his chance to swing, the pitcher explains to the surprised batter, because the batter failed to pitch himself a ball to hit.

That is not how baseball works, nor is it how the Clean Air Act works. There is a necessary, sequential structure to baseball just like the necessary, sequential structure to the Clean Air Act. Both the batter and the pitcher—like the States and EPA—have their roles to play. The batter does not and cannot pitch to himself, just as the States do not and cannot do EPA's job. EPA is attempting to fundamentally change the game and

take over the States' role. This Court should not allow it to do so.

I. CONGRESS RESERVED TO THE STATES A CRITICAL ROLE IN THE CLEAN AIR ACT.

The Clean Air Act "creates a partnership between the states and the federal government." *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). "The federal government through the EPA determines the ends—the standards of air quality—but Congress has given the states the initiative and a broad responsibility regarding the means to achieve those ends through state implementation plans and timetables for compliance." *Ibid.* Once EPA has set the national ambient air standards, "it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations." *Train v. Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975). That secondary role includes approving a state implementation plan "if it meets all of the CAA's requirements," *BCCA Appeal Grp. v. EPA*, 355 F.3d 817, 822 (5th Cir. 2003) (citing 42 U.S.C. § 7410(k)(3)), or promulgating a federal plan if a State fails to act or acts inadequately, 42 U.S.C. § 7410(c)(1).

The division of responsibility ensures that "air pollution prevention . . . and air pollution control at its source" remains "the primary responsibility" of those closest to it. *Id.* § 7401(a)(3). Congress determined that there was a need for "[f]ederal financial assistance and leadership," but also recognized the importance of state and local participation. *Id.* § 7401(a)(4). This structure respects the principles of federalism on which

this country was founded. *See Ala. Envtl. Council v. Adm'r, U.S. E.P.A.*, 711 F.3d 1277, 1280 (11th Cir. 2013) ("The Clean Air Act . . . provides a cooperative-federalism approach to air quality regulation."); *Bethlehem Steel Corp.*, 742 F.2d at 1036 ("The Clean Air Act is an experiment in federalism, and the EPA may not run roughshod over the procedural prerogatives that the Act has reserved to the states."). It also reflects an important understanding that "varying conditions and needs" require local experience and flexibility in implementation. 42 U.S.C. § 7402(a).

As EPA itself has previously acknowledged, it "makes sense" to give the States primary responsibility for implementation because the agency is unfamiliar with local circumstances and priorities. EPA, Understanding the Clean Air Act, http://www.epa.gov/air/caa/peg/understand.html. States are "able to develop solutions for pollution problems that require special understanding of local industries, geography, housing, and travel patterns, as well as other factors." *Ibid.* One State may choose to allocate pollution cuts by power output to reward efficiency. Another may do so by fuel type to encourage some sources of power and discourage others. And yet another might want to make cuts in a fuel-neutral manner. Local needs could warrant dividing cuts among existing and future sources of pollution to ensure, for example, the construction of new power plants. Or they might prompt a State to institute an auction for the right to emit pollutants and let a market-trading scheme determine how cuts will be made. *See generally* Pet. App. 7a; Ca. Econ. & Allocation Advisory Comm., Allocating Emissions Allowances Under a Cal. Cap-and-Trade Program: Recommendations to the Ca. Air

Res. Bd. & Ca. Envtl. Prot. Agency 8–21 (Mar. 2010), available at http://www.climatechange.ca.gov/eaac/documents/eaac_reports/2010-03-22_EAAC_Allocation_Report_Final.pdf (describing different mechanisms for distributing emissions allocations and setting their value).

In the past, EPA recognized that this cooperative structure extended to the good-neighbor obligations that the Clean Air Act imposes on States. The agency determined fifteen years ago that it must first "determine[] the overall level of reductions" through multi-state regional programs for regional pollutants like fine particulates ($PM_{2.5}$) and ozone, after which "it falls to the State to determine the appropriate mix of controls to achieve those reductions." 63 Fed. Reg. 57,356, 57,369 (Oct. 27, 1998). As EPA explained:

> Determining the overall level of air pollutants allowed to be emitted in a State is comparable to determining overall standards of air quality, which the courts have recognized as EPA's responsibility, and is distinguishable from determining the particular mix of controls among individual sources to attain those standards, which the caselaw identifies as a State responsibility.

Ibid.

II. EPA'S NEW VISION OF THE CLEAN AIR ACT GIVES IT THE ABILITY TO SHUT OUT THE STATES ENTIRELY.

In promulgating the Transport Rule, however, EPA has ignored its own previous statements and taken an unprecedented view of state-federal relations under the Clean Air Act. On the day it issued the rule, the agency simultaneously imposed fifty-nine federal implementation plans mandating how the States subject to the rule must meet EPA's goals. Without allowing the States an opportunity to submit state plans, the agency forced power plants in twenty-seven states into EPA-designed cap-and-trade programs at a cost of $2.4 billion per year to the power plants and utilities. 76 Fed. Reg. 48,208, 48,212, 48,217 n.10, 48,220 n.12 (Aug. 8, 2011); EPA, Fact Sheet: The Cross-State Air Pollution Rule, http://www.epa.gov/airtransport/CSAPR/index.html. EPA justifies this approach on the ground that the States should have determined their good-neighbor obligations on their own and promulgated implementation plans long before EPA did so in the Transport Rule. *See* EPA Br. 29–30; NY Pet. Br. 24–27; 29–35. In other words, the States should have pitched the ball to themselves and hit it.

As described in more detail below, EPA's novel theory is not only backwards, but an attempt to shut out the States entirely. *First*, the agency would require the States to do the impossible—to get a consortium of thirty-plus States with limited money, expertise, and technology to run a complicated atmospheric model, agree on each State's pollution responsibility, and develop and submit state plans for EPA review all within three years. *Second*, even if the impossible

were accomplished, EPA claims the right to reject whatever the States did.

This attack on competitive federalism cannot stand. EPA understandably may feel that it has wasted years in litigation over prior rules and that it must now impose federal implementation plans to make up for lost time. ALA Br. 5–6, 27, 57, 67–68 (complaining that "[t]he court of appeals" had made "interstate transport regulation an endless cycle of delay and failure, . . . thwart[ing] timely attainment of the nation's health-based air quality standards" for "over a decade," such that "[t]he notion that EPA was obligated to defer action in these circumstances is untenable"); *see also* EPA Br. 27–29, 32; NY Br. 27–29. But that does not permit the agency to fundamentally transform the state-federal partnership that *Congress* mandated in the Clean Air Act. Nor should it allow EPA to conveniently ignore that it expressly took on for itself the job of quantifying cross-state air pollution, while promising to give the States "real choice" in determining how to achieve EPA's reductions within their borders. Tex. Br. 5–8; Br. of Utility Air Regulatory Group, *et al.* 7–8.

A. The States Cannot Possibly Quantify the Amount of Cross-State Air Pollution to Cut in Each State.

As EPA determined years ago, Congress gave the agency the responsibility to quantify cross-state air pollution because it is a classically federal problem. By its nature, *cross-state* air pollution is a multi-state issue. Quantifying and addressing it requires data and participation from numerous states, as well as

sophisticated technology and significant resources. It is the sort of issue Congress envisioned when it found, in enacting the Clean Air Act, that "[f]ederal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution." 42 U.S.C. § 7401(a)(4); *see also* 63 Fed. Reg. at 57,370 (describing need for a federal "solution to a multi-state problem while preserving the maximum amount of state flexibility in . . . the specific control measures to be adopted").

To suggest that the States must handle the task, as EPA now argues, is to ask for the impossible. While EPA has authority and tools from Congress to compel or encourage multi-state cooperation, a consortium of voluntary states cannot overcome all the practical and legal problems that arise when a group of equals with competing interests attempts to collaborate. In addition, as discussed further below, the States do not have sufficient money, expertise, or time.

1. The States Cannot Overcome the Problems Inherent in a Multi-State Consortium of Unprecedented Size.

a. Quantifying and addressing air pollution from regional pollutants requires data and participation from a very large group of states. As EPA's own modeling for the Transport Rule shows in the figure below, cross-state air pollution is not just a problem between bordering States. Air pollution can travel great distances, and a large number of disconnected States can combine to pollute another State's air.

FIGURE 1
TRANSPORT RULE MAP OF CROSS-STATE AIR POLLUTION[2]

Sorting through the tangled web and pinpointing any one State's good-neighbor obligations requires knowledge of every State's contributions to each of its downwind States. For instance, EPA concluded that air pollution enters Texas from States as far away as Illinois, Indiana, South Carolina, Georgia, and Florida. EPA, Office of Air and Radiation, Presentation, Cross-State Air Pollution Rule, 22, available at http://www.epa.gov/airtransport/pdfs/CSAPRPresentation.pdf. And, according to EPA, West Virginia pollutes the air of thirty-three different States, fourteen of which send their own air pollution back into West Virginia. EPA, *Benefits and Costs of the Clean Air Act, Cross-State Air Pollution Rule in*

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[2] EPA, Office of Air and Radiation, Presentation, Cross-State Air Pollution Rule, 22, available at http://www.epa.gov/airtransport/pdfs/CSAPRPresentation.pdf.

West Virginia, http://www.epa.gov/cleanairactbenefits/whereyoulive/wv.html.

To make matters more difficult, the exact composition of the group is difficult to determine, as it is largely unknowable at the outset which States are polluting which others and to what degree. For example, the Transport Rule covers twenty-seven States, but EPA had considered at least thirty-one. 76 Fed. Reg. at 48,208. The agency ultimately excluded three eastern States—Delaware, Connecticut, and Massachusetts—that had been included under the agency's earlier cross-state air pollution rule, the Clean Air Interstate Rule (CAIR). 76 Fed. Reg. 2,853, 2,856–58 (Jan. 18, 2011); *see also* 76 Fed. Reg. at 48,212–15; 70 Fed. Reg. 25,162, 25,167 (May 12, 2005). At the same time, EPA included three western States—Oklahoma, Kansas, and Nebraska—that had been excluded from CAIR. *Ibid.*

Importantly, each State must actively contribute the time and efforts of its air quality experts. EPA makes available raw data from state emissions inventories, *see, e.g.*, 40 C.F.R. Pt. 51 *et seq.*; 78 Fed. Reg. 37,164 (June 20, 2013); 73 Fed. Reg. 76,539 (Dec. 17, 2008), but that data must be reviewed and revised for quality assurance. State air quality teams must be available during the modeling process to see if the numbers square with what the State knows about its pollution, to identify collection errors, and to compare the data to other States' inventories. As a map of emissions density shows, air pollution can vary significantly from county to county, making local expertise critical.

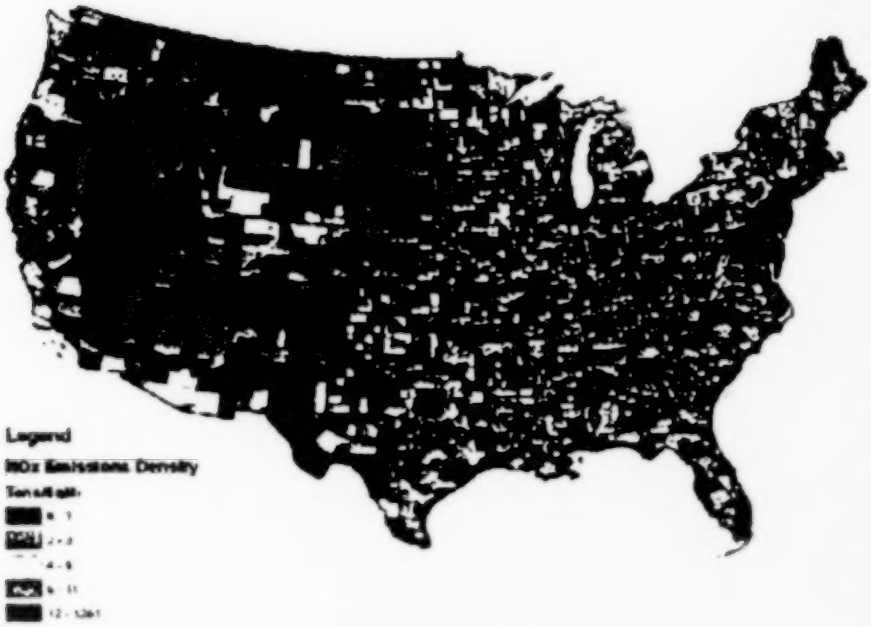

FIGURE 2
EMISSIONS DENSITY[3]

Contrary to the suggestion of the parties supporting EPA and the dissent below, no single State can reliably work with other States' data. *See* NY Br. 31 (stressing that States have access "to data from upwind and downwind States"); ALA Br. 54–55 ("[A]ir quality data for each NAAQS pollutant are freely and publicly available on a monitor-by-monitor basis for each county in the country."); Pet. App. 90a–91a (asserting that States have "capability ... to access [emissions] information from other States to independently determine emission reduction budgets"). Only a State's own air quality team can effectively review a State's data because only they have the

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[3] EPA, 2008 National Emissions Inventory: Review, Analysis and Highlights 18, available at http://www.epa.gov/ttnchie1/net/2008report.pdf

necessary local expertise to critically evaluate the raw data at different stages of modeling. Even EPA relies on individual States' experts to vet its national emissions inventory data, *see* EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, The National Emissions Inventory, http://www.epa.gov/ttn/chief/net/2011inventory.html (releasing the 2011 national emissions inventory for public review), and looked specifically to the States for help while developing the Transport Rule, *see, e.g.*, 75 Fed. Reg. 45, 210, 45,217 (Aug. 2, 2010); JA 251 (submitting technical corrections to EPA's Transport Rule model and stating that "EPA has acknowledged inaccurate or flawed data in the initial development of the proposed Transport Rule").

b. EPA is well-suited to the task of quantifying cross-state air pollution because Congress has given it tools and authority to encourage or compel multi-state cooperation. Through its rulemaking power, EPA can require States to make emissions data available to the agency, and it has done so. 40 C.F.R. § 51.30. Moreover, any time the agency uses that data to develop or propose substantive rules, the States have a strong incentive to participate in the process, as they will be primarily responsible for implementing and complying with those rules. At least thirty-six States participated in the development of the Transport Rule, many of them providing multiple sets of comments and large spreadsheets of data requested by EPA. *E.g.*, Comments of John A. Benedict, W. Va. Dep't of Envtl. Prot., Docket ID: EPA-HQ-OAR-2009-0491-3848 (Nov. 29, 2010), available at regulations.gov (Tracking Number: 80ba2f8b).

In addition, EPA has express statutory authority to create and lead multi-state regional commissions to work on cross-state pollution issues—though it did not use this specific authority in developing the Transport Rule. 42 U.S.C. § 7506a. Under Section 7506a, the EPA Administrator "may add any State or portion of a State to any region established under this subsection whenever the Administrator has reason to believe that the interstate transport of air pollutants from such State significantly contributes to a violation of the standard in the transport region." *Ibid.* Any such commission would consist of national and regional EPA officials, as well as state governors and state air quality officials, and could be funded in significant part by EPA. *Id.* §§ 7506a(b), 7406. The commission would make decisions by majority rule and transmit its recommendations and requests to EPA, which would have the final say. *Id.* § 7506a(b), (c).

c. In contrast to EPA, the States could not overcome all the problems that arise when a group of equals with competing interests attempts to collaborate. To begin with, it is extremely unlikely that all necessary States would even be interested in collaboration. Based on the Transport Rule, thirty-plus States would have to be involved. But as shown in this case, some of those States are willing to acquiesce to EPA. *See generally* NY Br. 29.

The absence of one or more necessary States could be fatal to the collaboration. Significantly, the remaining collaborators would not have the assistance of the missing States' air experts. Without their knowledge and adjustments, their States' data would be unreliable, which would likely distort the results of

the model. As the saying goes: garbage in, garbage out. At a minimum, EPA could use the absence of one or more critical States as an excuse to disapprove any resulting state plans. *See infra* Part II.B.

Even if every State were interested, the sheer number of States required could be an insurmountable hurdle. The States would need to negotiate an agreement to govern—at a minimum—funding, staff, equipment, and the management of day-to-day operations. It is easy to imagine such negotiations consuming valuable months and eventually falling apart. Without an agreement, however, the logistical challenges of the collaboration would surely kill it.

Finally, assuming an agreement could be reached in a reasonable amount of time, the States' conflicting interests would likely cripple the collaboration. No State will be willing to give up entirely its right as an equal sovereign to veto certain decisions or withdraw from the collaboration unilaterally. That power is most likely to become a problem when the time comes to agree on how much air pollution each State must cut. Cross-state air pollution is a zero-sum game. For some States to benefit, others must lose. When it starts to become clear which States will pay the higher price, at least some of those States could decide to take their chances with whatever federal plan EPA might impose and pull out of the collaboration.

Collectively, these structural problems make it impossible for the States to determine the amount of cross-state air pollution each State must cut. As EPA explained previously, "[w]here many States are involved and the choices of each individual State could

affect the choices and decisions of the other States the need for initial federal action is manifest." 63 Fed. Reg. at 57,370. The agency thus seriously "doubt[ed]" that such "disagreements" among States over the amount of their good-neighbor obligations "could ever be resolved by consensus." *Ibid.* Instead, EPA concluded that "[i]t is most efficient—indeed necessary—for the Federal government to establish the overall emissions levels for the various States." *Ibid.*

d. EPA now suggests, together with its supporters and the dissent below, that existing state models and collaborations show that States can undertake the necessary multi-state collaboration. Pet App. 90a–91a; EPA Br. 29; ALA Br. 53–54; NY Br. 31. But EPA is asking for something unprecedented in size and scope. States have previously pooled resources through Regional Planning Organizations (RPOs) to hire contractors to conduct emissions inventories and photochemical modeling. As the following map shows, however, the largest of these collaborations includes only fifteen States. *Cf.* Ross & Associates and Industrial Economics, Final Report to EPA, Evaluation of National Air Quality Regional Planning Organization Program 8–9 (July 7, 2011), available at http://www.westar.org/Docs/Business%20Meetings/Fall11/04.1%20RPO%20Program%20Evaluation%20FINAL%20Sept%2028th%202011.pdf (hereinafter EPA RPO Report) (listing the different past sizes of all regional collaborations). All *four* non-Western regional collaborations would need to be combined to achieve a group of States as large as that covered by the Transport Rule.

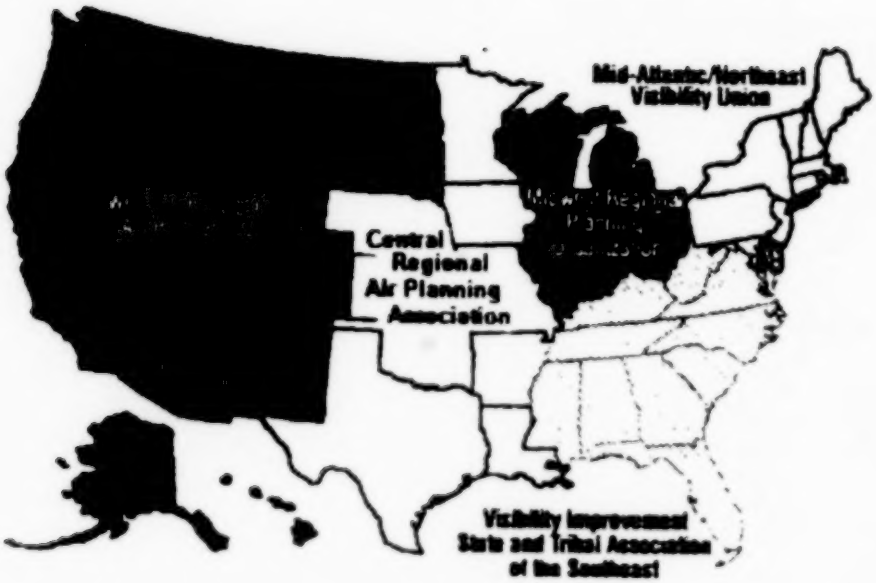

FIGURE 3
REGIONAL PLANNING ORGANIZATIONS[4]

The vast difference in size is significant. The problems with collaboration become exponentially more difficult as a group grows larger. Each additional State dramatically increases the logistical challenges, the likelihood of conflict, and the difficulty in reaching consensus. *Id.* at 39 (reporting that "having more than seven [States collaborate] would likely exacerbate costs and fragment important geographic areas with shared needs").

Nor is it the case that the RPOs or any other existing regional collaborations (such as Multi-Jurisdictional Organizations) could simply band together to work on cross-state air pollution. *See ibid.*

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[4] EPA, Regional Planning Organizations, http://www.epa.gov/visibility/regional.html.

For starters, these regional organizations have worked in the past on local issues in which the States were not in competition with each other, such as regional haze. *Ibid.* In addition, none of these organizations has any mandate to work on cross-state air pollution. Indeed, EPA funds these RPOs and specifically limits them to regional haze issues. *Id.* at 19, 42–43. Finally, some of these organizations include non-state stakeholders, which introduces a variety of potential problems and concerns.

2. The States Do Not Have the Necessary Resources.

a. Even if the States could overcome the obstacles to collaboration, an atmospheric model requires significant resources that the States do not have. It is not simply a matter of downloading a computer program to a laptop. The States must create a complex atmospheric model that predicts what cross-state air pollution will look like in the future. Much like a weather storm model, EPA's Transport Rule model simulated in 3-D "the numerous physical and chemical processes involved in the formation, transport, and destruction" of pollutants. EPA, Regulatory Impact Analysis (RIA) for the Transport Rule at 35–40, 60–62, 142–45, Docket ID No. EPA-HQ-OAR-2009-0491, available at http://www.epa.gov/airtransport/CSAPR/pdfs/FinalRIA.pdf (hereinafter RIA). The "photochemical" model could show how regulatory control programs, economic growth, climate change, or any other factor affected cross-state pollution over future years, right down to the hour and 12-kilometer squares within States. RIA 402–408 (summarizing results). Such a model requires a large cluster of

computers or a supercomputer, as well as people with the special expertise to use the software, usually scientists and statisticians with advanced degrees. *See* CAMx, CAMx User's Guide Versio 6.0 2.1.2 (May 2013), http://www.camx.com/files/camxusersguide_v6-00.pdf.

EPA is a large federal agency with abundant resources, including the necessary computer software, equipment, and personnel. Its budget appropriations in FY 2012 was $8.45 billion, and it employed 17,106 people. Consolidated Appropriations Act, 2012, Pub. L. No. 112-74, Div. E, tit. II, 125 Stat. 786, 1015–1020 (2011); EPA, EPA's Budget and Spending, http://www2.epa.gov/planandbudget/budget. Among the many laboratories, research centers, and supercomputers available to the agency, EPA has an Environmental Modeling and Visualization Laboratory staffed with experts that can "support EPA's scientific modeling and large-scale data management research programs through the application of High Performance Computing (HPC) and visualization tools." EPA, Environmental Modeling and Visualization Laboratory, http://www.epa.gov/nesc/; *see generally* EPA, Labs and Research Centers, http://www2.epa.gov/aboutepa#pane-5 (listing twenty-five different EPA environmental research laboratories across the country). It also has the money, when necessary, to contract with private companies for expensive proprietary models. *See infra* Part II.B.2.

The States do not have those resources. Most States' existing models can only model tiny areas near their States' large point sources. Arkansas, Kentucky and West Virginia, for example, can model the local

impact of a single smokestack, but they cannot conduct broader photochemical modeling. Any state collaboration would need to purchase or get access to a networked cluster of computer servers with enormous storage capacity (probably hundreds to thousands of Terabytes of data).

Individual States would also need to hire and train additional personnel with expertise in regional photochemical modeling, as their small staffs are already fully occupied. Kentucky has six employees dedicated to the development of state implementation plans for air quality, plus four additional employees dedicated to keeping state law up to date, with a collective operating and personnel budget of $900,000 annually. West Virginia has a staff of four people that focus on SIP planning and related rule development, with an approximate budget of $300,000-$400,000. Arkansas has three employees dedicated to the administrative side of SIP development, plus additional staff as needed, with a total budget of $385,000 for SIP obligations in FY 2012.[5]

All of this costs money—a lot of money. The costs of the much-smaller RPOs have been as much as $10 million per year—funded in significant part by federal dollars. EPA RPO Report 57. Kentucky estimates that its additional costs alone would total $500,000 to $1,000,000 at a minimum.

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[5] Other States have similar resource limitations. For example, North Dakota has a SIP development and processing budget of $ 150,000 per year and a staff of 1.5 full-time employees. Wyoming has only two full-time staff for SIP planning.

And even assuming the States have the financial resources, it would be difficult to persuade State legislatures to voluntarily spend it on a multi-state collaboration, given that EPA already requires the States to dedicate significant resources to collecting ambient air quality monitoring data for EPA. Kentucky has two sections of nineteen employees and forty-one monitoring stations, with ninety-nine monitors in twenty-seven counties collecting air quality data that is reported to EPA. Collectively, these tasks cost the State $2.5 million per year. West Virginia has a team of nine to ten people with about fifty monitors collecting its air quality data for EPA. W.V. Dep't Envtl. Protection, Emissions Inventory, http://www.dep.wv.gov/daq/planning/inventory/Pages/default.aspx. Arkansas coordinates thirty-six monitors at sixteen locations, with eight employees involved in monitoring emissions and assembling inventories. This air pollution monitoring and modeling costs the State $367,000 per year.[6] With all these dollars working at EPA's behest, state legislatures are likely to wonder why the agency could not simply do the job itself—especially if, as happened here, the agency repeatedly said it would do so. *E.g.*, 63 Fed. Reg. at 57,369; 70 Fed. Reg. at 25,263-64.

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[6] Other States have similar resources dedicated to data collection. For example, North Dakota has seventeen sites that it monitors or audits, which costs the State an estimated $500,000 per year to operate. Wyoming has 30 long-term monitoring sites and 4 mobile monitoring stations, costing the State approximately $2 million per year, not counting the cost of employees.

b. The resource most lacking is time. EPA asserts that the States would have to quantify their good-neighbor obligations and submit state plans no later than three years after a national air quality standard is announced. *See* EPA Br. 16, 26–28 ("The statutory language here could not be clearer. Under the Act, each State 'shall' submit a state plan to the EPA within three years after the promulgation of a new or revised air quality standard, and '[e]ach such plan shall' contain adequate provisions to control emissions from the State that significantly contribute to nonattainment or interfere with maintenance in another State."). That is simply impossible, in light of everything that must happen. Even EPA could not have met that deadline with the Transport Rule. The three air quality standards at issue in the Transport Rule were announced in 1997 and 2006. But EPA did not release the rule and its FIP until late summer 2011.

The first problem, as already discussed, is the forming of a multi-state consortium. Significant time is needed to negotiate the terms of such a consortium. With notice from EPA, it is possible that the States could begin such discussions before the announcement of an air quality standard, but even so, there is no way to be sure that an agreement would be reached by the time the announcement is made.

Next, the development of the atmospheric model alone could take years. The States would need to allocate funds (potentially through their legislatures), undergo a procurement process for contractors, train any new staff, and assemble the computer resources. To do regional photochemical modeling, Kentucky

estimates that it would need at least five years to acquire and train staff and obtain and set up computer resources.

Data quality assurance also requires significant time. By rule, the States develop emissions databases for EPA every three years. 40 C.F.R. § 51.30. But it then takes EPA years to finalize that data through a public review process. For example, the most recent national emissions inventory is for 2008, which EPA did not release to the public in final form until March 2013. EPA, Technology Transfer Network Clearinghouse for Inventories & Emissions Factors, Emission Inventories, available at http://www.epa.gov/ttnchie1/eiinformation.html. States have taken a similar amount of time when putting together independent regional inventories. *E.g.*, W. Va. Dep't of Envtl. Prot., Proposed State Implementation Plan Revision: Regional Haze 5-Year Periodic Report 63 (March 2013), http://www.dep.wv.gov/daq/publicnoticeandcomment/Documents/WV%20RH%20Midcourse%20Review%20PROPOSED%202013-03-18.pdf (reporting that the southeastern RPO takes five years to finalize its regional emissions inventories).

The States will then need another year or more to run the data through the model. West Virginia state air pollution experts report that it regularly takes at least a year to put data into a multi-state model and evaluate how realistic the model is. Moreover, in their experience, these sorts of complex atmospheric models often crash or give strange results at least the first time. It is impossible to predict how many runs would be required to weed out all the bad data and obtain reliable scientific predictions.

Once they have the model's results, the States will need further time to agree on their obligations and develop their state plans. As noted earlier, the States would likely have difficulty reaching consensus on how much pollution each State must cut and how soon. Then, each State would need to develop a plan for achieving those cuts within its borders. Because complex SIP revisions often require extensive consultation with stakeholder industries, developing individual state plans could take years.

After that, depending on each State's rulemaking process, it could take months to write a new state plan into law. The West Virginia Constitution, for instance, requires the State to enact all rules through its part-time citizen legislature. W. Va. Code § 29A-1-1 et seq. After the time required to develop a state plan, it can take the West Virginia Department of Environmental Protection a year to propose the plan to the state legislature and have it passed into law and ready for submission to EPA. *See* W. Va. Sec'y of State, Summary of Regular Rule Making Steps, http://www.sos.wv.gov/administrative-law/rulemaking/Pages/stepsummary.aspx. Under a similar process in Arkansas, the average SIP revision takes eighteen months or more.

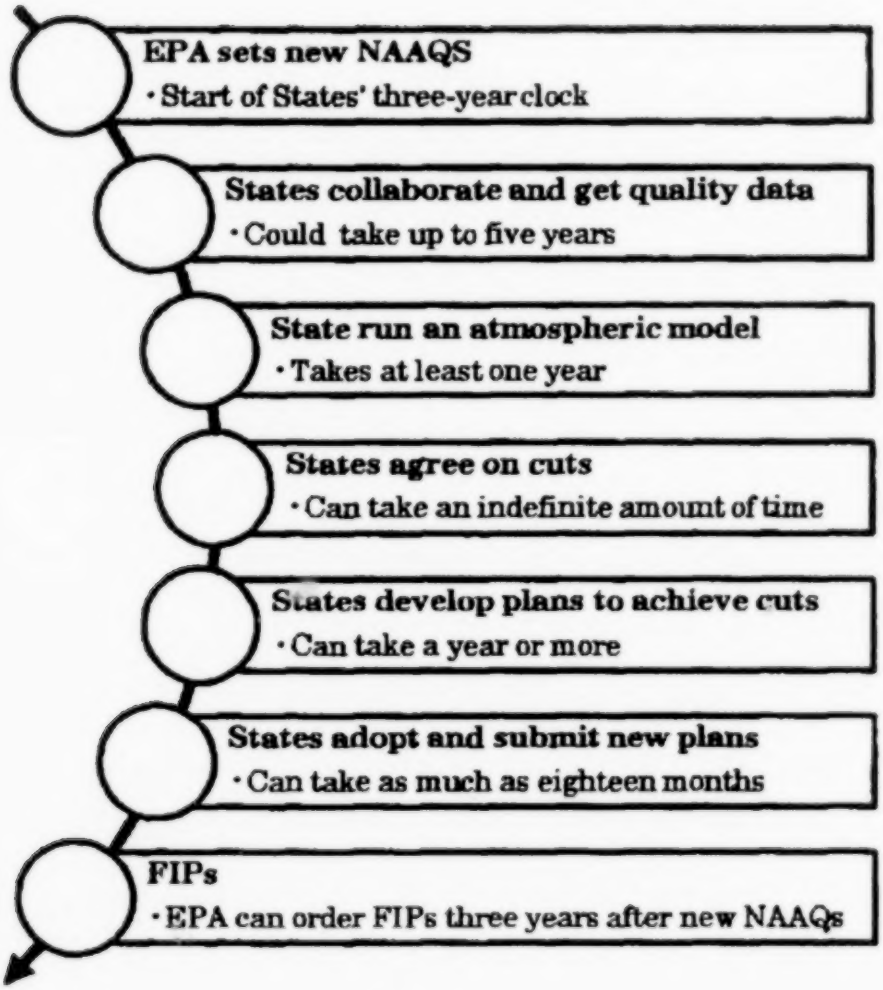

FIGURE 4
STATE OBLIGATIONS COMPARED TO EPA'S
THREE-YEAR TIMELINE

All of these steps together will span well more than three years, as evidenced by EPA's own history in developing its cross-state air pollution rules. *Eight* years elapsed between the announcement in 1997 of two national ambient air quality standards ("NAAQS") and the issuance in 2005 of CAIR, EPA's cross-state air pollution rule that covered those NAAQS. *See* 62 Fed.

Reg. 38,856 (July 18, 1997); 62 Fed. Reg. 38,652 (July 18, 1997) ($PM_{2.5}$ NAAQS); 70 Fed. Reg. 25,162, 25,167 (May 12, 2005). After EPA announced a third air quality standard in 2006, it did not issue the Transport Rule for another *five* years. *See* 76 Fed. Reg. 48,208 (Aug. 8, 2011) (using 1997 annual $PM_{2.5}$ and 1997 ozone NAAQS as the basis of the Transport Rule); 76 Fed. Reg. 48,208 (using 2006 daily $PM_{2.5}$ NAAQS as a further basis of the Transport Rule); 71 Fed. Reg. 61,144 (Oct. 17, 2006). Even if part of this time is due to litigation and not regulatory delays, there is no reason to expect a multi-state collaboration to be immune from similar court challenges and other related setbacks.

In sum, numerous structural obstacles and resources deficiencies—jointly and severally—make it impossible for the States to do what EPA plainly can. To quantify each States' good-neighbor obligation would require an unprecedented multi-state consortium, fraught with all the difficulties that arise when a group of equals with conflicting interests attempts to cooperate. On top of that, the States simply lack the money, manpower, and time to get the job done.

B. EPA Reserves an Effectively Unlimited Veto Over the States' Conclusions.

Even if the States could accomplish the impossible, EPA claims to have an effectively unlimited veto over the States' conclusions. By statute, EPA has limited authority to reject a SIP and replace it with a FIP. 42 U.S.C. § 7410(c)(1), (k). The Clean Air Act grants the States "*broad authority* to determine the

methods and particular control strategies they will use to achieve the statutory requirements." *BCCA Appeal Grp.*, 355 F.3d at 822 (emphasis added). EPA is charged only with ensuring that "the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air." *Train*, 421 U.S. at 60; *see also* 42 U.S.C. § 7410(k)(3) ("[T]he Administrator shall approve [a SIP or SIP revision] as a whole if it meets all of the applicable requirements of this chapter.").

But the States supporting EPA contend that, under their novel view of the Act, this authority includes the power to reject a SIP if the agency disagrees with the States' assessment of their good-neighbor obligations. *See* NY Br. 33 ("To be sure, in reviewing a SIP submission, EPA may ultimately disagree with a State's determination of its good-neighbor obligations and issue a FIP that provides its own determination of how to address interstate air pollution."); *see also* ALA Br. 53 (recognizing that "a State's assessment of its contribution might diverge from subsequent federal findings").

This is a sweeping assertion of agency power, given the vast number of technical and legal judgment calls that the States would have to make. As EPA and its *amici* acknowledge, determining how much a State pollutes another State's air is an incredibly complicated task. *See* Calpine Br. 21–25, 48 (explaining why the analysis is "more complex" than even EPA suggests); *see also* EPA Br. 6–7, 10–12, 46, 51–52; ALA Br. 15–20, 36; Law Professors' Amicus Br. 25. The process of creating the necessary atmospheric model involves numerous decisions and judgment calls

about the right data, forecasts, and software for the model. All of these decisions give EPA virtually unlimited ability to disagree with the States and to render meaningless all of their efforts and expense.

1. One key decision is to determine the base year for data from the national emissions inventory. As noted earlier, every three years States report to EPA data for all emissions in their States over one year. 40 C.F.R. § 51.30; EPA, Emissions Factors & AP 42, Compilation of Air Pollutant Emission Factors, http://www.epa.gov/ttn/chief/ap42/index.html. This data includes direct measurements from large industrial sources of pollution, like the smokestacks at power plants (known as point sources). W. Va. Code St. R. § 45-29-1; W.Va. Dep't Envtl. Prot., Emissions Inventory, http://www.dep.wv.gov/daq/planning/inventory/Pages/default.aspx. States also estimate emissions from on-road mobile sources (like cars and trucks), off-road mobile sources (like airplanes, boats, construction equipment, and agricultural field equipment), biogenic sources (like trees and wild deer), and non-point sources (like wildfires, field burning, and residential fuel combustion through stoves and backyard barbeque grills). EPA, 2008 National Emissions Inventory: Review, Analysis and Highlights 11–13, available at http://www.epa.gov/ttnchie1/net/2008report.pdf. A full set of data from one year can then be the "base year" for a model, which will project future emissions from that year's data.

The choice of base year can significantly affect modeling results. Some years may be hotter, leading to unusually high emissions. *See* EPA, Development of 2011 Modeling Platform and Early Release of

Emissions Inventories, Briefing for RPOs/States 8 (Aug. 15, 2013). Years that precede an economic downturn can become quickly outdated, due to subsequently shuttered power plants and generally lower industrial production. Still other years may, for a variety of subjective reasons, be deemed to have better data than others. 76 Fed. Reg. at 48,230 (describing several reasons for EPA's selection of base year 2005 data for the Transport Rule, including that "it was an appropriate meteorological year" providing "a sufficient number of 'high' modeled days to project to the future").

2. Another set of judgment calls are the economic, regulatory, and climate forecasts necessary to project future emissions. 76 Fed. Reg. at 48,250–54; RIA 54. These forecasts touch on nearly every factor that might bear on future emissions, including the growth of different industries, the effect of future laws, and climate and weather patterns. RIA 50, 60–64. The forecast for electricity is critical, as the generation of electricity creates the lion's share of emissions. RIA 228–229, 237.

States would need to make a number of different decisions with respect to forecast data. For example, what data or predictions should be used? To forecast electricity for the Transport Rule, EPA used information about power plants from the National Electric Energy Data System (NEEDS) database, as well as predictions from the Energy Information Administration about the future of energy. *See* EPA, Documentation for EPA Base Case v.4.10 Using the Integrated Planning Model, Modeling and Data Structures in EPA Base Case v.4.10 4-1–4-45 (Aug.

2010), available at http://www.epa.gov/airmarkets/progsregs/epa-ipm/transport.html (hereinafter IPM Base Data). The States could also rely on this publicly available information, but it fluctuates and is often revised, giving EPA ample grounds for second-guessing.

Further, should the data be run through a sub-model? EPA employed a complex sub-model called the Integrated Planning Model (IPM) to combine the NEEDS and EIA electricity forecasts with a variety of other forecasts. IPM Base Data at 2-1; RIA 249. Given their sparse fiscal resources, the States could not easily do the same, as the IPM is proprietary and must be purchased. ICF International, ICF at a Glance, http://www.icfi.com/about; ICF International, Integrated Planning Model, http://www.icfi.com/insights/products-and-tools/ipm. Nor is the sub-model available from EPA, which specially updated and revised the IPM throughout the Transport Rule process for quality assurance. EPA, Notice of Data Availability Supporting Federal Implementation Plans To Reduce Interstate Transport of Fine Particulate Matter and Ozone, 75 Fed. Reg. 53,613 (Sept. 1, 2010); 76 Fed. Reg. at 48,229. Yet failure to utilize the sub-model could be another ground for later disagreement.

3. Selecting and developing the software for the atmospheric model raises yet more judgment calls. The States would have to make on-going decisions about upgrading, supplementing, or changing the modeling software. *See* 76 Fed. Reg. at 48,229; *see also* EPA, Development of 2011 Modeling Platform and Early Release of Emissions Inventories, Briefing for RPOs/States at 5 (Aug. 15, 2013) (explaining that the

"[c]omponents of modeling platform are, by their very nature, 'evolutionary' and not static").

If EPA were later to create its own model to assess the States' model, there would be numerous possibilities for divergence. EPA might use an older or a more upgraded model than that used by the States. Or, the agency might augment its model in a unique way, as it did while developing the Transport Rule by creating its own add-on assessment tool. 76 Fed. Reg. at 48,249, 48,253; *see* ALA Br. 15–17.

4. Finally, the States would have to make a legal judgment call that they have no authority to make. The good-neighbor obligation only applies to those States that "contribute significantly" to another State's nonattainment. 42 U.S.C. § 7410(a)(2)(D)(i)(I). In the Transport Rule, EPA chose specific significance thresholds for each NAAQS. 76 Fed. Reg. at 48,236.

Under EPA's novel approach, the States would have to decide for themselves what constitutes a "significant" contribution in order to complete the process and submit their SIPs. But as the State Respondents explain and the agency has previously acknowledged, only EPA has the authority to make that determination. Tex. Br. 49–60; 63 Fed. Reg. at 57,368–70 (stating that EPA "interpret[s] the ambiguity in section 110(a)(2)(D)(i)(I) to include this determination among EPA's responsibilities"); *see also Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 468 U.S. 837 (1984). By requiring the States to make an initial determination, EPA has reserved for itself yet another trump card over the States.

CONCLUSION

The judgment of the court of appeals should be affirmed.

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